Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

JUNEAU SCHOOL BOARD; DEBORAH MORSE,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment allows public schools to prohibit students from displaying messages promoting the use of illegal substances at school-sponsored, faculty-supervised events.

2. Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a public high school principal was liable in a damages lawsuit under 42 U.S.C. § 1983 when, pursuant to the school district's policy against displaying messages promoting illegal substances, she disciplined a student for displaying a large banner with a slang marijuana reference at a school-sponsored, faculty-supervised event.

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INTRODUCTION

In a case that has drawn the attention — and triggered the deep concern — of school boards and administrators nationwide, the Ninth Circuit has profoundly upset settled understandings of First Amendment and qualified immunity principles. The decision below subjects a public high school principal to personal liability for disciplining a student who displayed a banner expressing positive sentiments about illegal drug use at a school-sponsored and faculty-supervised event taking place on and adjacent to school grounds during school hours. Principal Deborah Morse was enforcing a school policy against displaying messages that promote illegal substances — a policy that is common in schools across the nation. For that entirely appropriate action, she faces the potential for ruinous liability.

School officials are now faced with a confusing, if not alarming, message. They are responsible for teaching students about the dangers of illegal drugs. But they also must tolerate pro-drug messages in the face of threats of draconian civil damages lawsuits. This is wildly wrong. And this Court should say so.

Not since *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), has the Court had occasion to provide guidance to public schools — and to parents and students — with respect to the delicate balance between students' constitutional rights, on the one hand, and the solemn duty of school administrators, on the other, to maintain order and instill fundamental values in the challenging context of public education. In light of the Ninth Circuit's double-barreled, destabilizing decision in this vital arena of our national life, this Court's authoritative guidance is badly needed.

OPINIONS BELOW

The orders and judgment of the United States District Court for the District of Alaska (per Sedwick, C.J.) granting

petitioners' summary judgment motion are reprinted at App. 23a-44a and are not otherwise published. The Ninth Circuit's decision (per Kleinfeld, J., joined by Hall and Wardlaw, JJ.) reversing the district court is reprinted at App. 1a-22a and is published at 439 F.3d 1114. The court of appeals' order denying rehearing and rehearing en banc is reprinted at App. 45a-46a and is not otherwise published.

JURISDICTION

The Ninth Circuit rendered its decision on March 10, 2006, and denied rehearing and rehearing en banc on April 18, 2006. Justice Kennedy subsequently extended the time to file this petition for a writ of certiorari to and including August 28, 2006. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND SCHOOL DISTRICT RULES INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

Title 20, Sections 7101 *et seq.* of the United States Code, codifies the Safe and Drug-Free Schools and Communities Act, pertinent parts of which are reprinted at App. 47a-51a.

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in

> equity, or other proper proceeding for redress, ...

Juneau School Board Policy 5520, reprinted at App. 53a-54a, states, in pertinent part:

> The Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . . .

Juneau School Board Policy 5721, reprinted at App. 54a-57a, states, in pertinent part:

> The distribution on school premises of the following types of materials is prohibited: materials that . . . advocate the use by minors of any illegal substance or material . . . .

Juneau School Board Policy 5850, reprinted at App. 58a, states, in pertinent part:

> Pupils who participate in approved social events and class trips are subject to district rules for student conduct; infractions of those rules will be subject to discipline in the same manner as are infractions of rules during the regular school program.

STATEMENT OF THE CASE

A. Factual Background

1. Surveys of Juneau, Alaska teenagers indicate that at least 60% use marijuana before graduating from high school, which is above the national average. Julia O'Malley, *Students and officials discuss teen drug use*, Juneau Empire, Nov. 26, 2002.[1] In response to concerns about teenage

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[1] This article was included in the Ninth Circuit record as part of Appellant's Excerpts of Record at 43 and Appellees' Supplemental Excerpts of Record ("SER") at 37-43.

substance abuse, the Juneau School Board promulgated a district-wide health and safety curriculum that emphasizes the dangers of illegal drug and alcohol use. SER 11, 18. The Board also established detailed policies for prevention, intervention, and discipline of students engaging in the illegal use or possession of drugs or alcohol. SER 19-26. In connection with these policies, the Board prohibits the display of materials that advertise or advocate the use of illegal drugs or alcohol on campus and at all school-sponsored events, whether on or off campus. App. 52a-58a. These policies are consistent with both state and federal law, including 20 U.S.C. § 7114(d)(6), which requires school districts receiving funds through the Safe and Drug Free Schools and Communities Act to certify periodically that their programs "convey a clear and consistent message that . . . illegal use of drugs [is] wrong and harmful." App. 49a.

2. Against this background, Principal Deborah Morse of the Juneau-Douglas High School was confronted with a flagrant violation of the school policies pertaining to pro-drug messages. The violation occurred during a school-sponsored and faculty-supervised event that took place on and adjacent to school grounds during school hours. The event was the Olympic Torch Relay, which came to Juneau on January 24, 2002.[2] Believing that the event had both

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[2] The Olympic Torch Relay is a long-standing Olympic tradition with roots in ancient Greece. *See generally* U.S. Olympic Comm., *Journey of the Olympic Flame: Igniting the Olympic Spirit* (2002). Every two years, in advance of the Olympic games, a ceremonial torch is ignited in Olympia, Greece and then travels to and throughout the country hosting the Olympic games. *Id.* at 9-10. The torch remains lit throughout its journey as thousands of torchbearers pass it from one to another until it reaches its final destination — the cauldron at the site of the opening ceremony for the Olympic games. *Id.* In 2002, the Winter Olympics took place in Salt Lake City, Utah. *Id.* at 123. January 24, 2002 marked

noteworthy educational value and high significance to the community, the Juneau School District allowed students to observe the relay. App. 34a. The district also allocated funds to transport students from schools not along the relay route to locations where they could view this memorable event. SER 4-5.

The Juneau-Douglas High School was located along the Olympic Torch Relay route. App. 24a. After classes started on the morning of the event, Juneau-Douglas High School administrators and teachers accompanied students from their classrooms to view the relay as it passed in front of the school. App. 24a-25a, 34a. While teachers were given the option of allowing their students to take part in this event on a class-by-class basis, Principal Morse was unaware of any teachers who declined to let their classes participate. SER 5-6, 70-77. Once outside the classroom, there was only one place where Juneau-Douglas High School students were allowed to be — in front of the school, either on campus or lined along either side of the street.[3] SER 6, 78-80.

During the event, high school cheerleaders were out in uniform to greet the torchbearers. App. 34a. The high school pep band played. *Id.* And four high school students, representing various segments of the student body, acted as

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the first time in Olympic history that the Olympic Torch Relay ever visited Alaska. *Id.* at 145. After landing in Juneau, the flame was welcomed by Tlingit Clan dancers, transported in a native canoe around Gastineau Channel, and then carried through several miles of Juneau's streets, including past the state Capitol, *id.*, and, as relevant here, the Juneau-Douglas High School.

[3] Because this event took place on and adjacent to school grounds, and because students remained under faculty supervision and were not otherwise released from school, the school did not require parental permission slips.

torchbearers, carrying the torch in front of the school as a small part of the 11,500-person chain of torchbearers who transported the torch along the 13,500-mile relay route. SER 5; U.S. Olympic Comm., *supra*, at 183.

3. Joseph Frederick, a Juneau-Douglas High School student, and several of his schoolmates positioned themselves on the sidewalk opposite the campus. App. 25a. As the torchbearers and television camera crews approached the school, Frederick and his friends unfurled a large banner emblazoned with the phrase "BONG HITS 4 JESUS." *Id.* "Bong" is a slang term for drug paraphernalia commonly used for smoking marijuana. App. 4a; SER 7, 126. A "bong hit" is slang for inhaling marijuana from such a device. App. 4a; SER 7. The term "bong hits" is widely understood by high school students and others as referring to smoking marijuana. App. 38a; SER 7. Frederick's banner, roughly 20-feet long,[4] was clearly visible to the large number of students on campus. App. 70a; SER 7.

Prior to displaying the banner, Frederick had been absent from school. App. 25a. And while Frederick might have selected any number of locations to unfurl his banner along the several-mile journey of the relay, Frederick chose instead to insert himself in front of the student body and to display the banner where it would be in full view of his fellow students.

Principal Morse approached Frederick and his friends and asked them to take down the banner. *Id.* While other students complied with the directive, Frederick continued to hold the banner and refused to take it down. *Id.* Frederick claimed he had a First Amendment right to display the

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[4] While Frederick's banner was not actually measured, a photograph taken of the incident shows approximately ten people standing shoulder-to-shoulder behind the banner. App. 70a.

banner because he was not physically on campus. App. 2a-3a; SER 7-8. Principal Morse responded to Frederick that he was participating in a school activity and that the banner was inappropriate. App. 3a. When Frederick still refused to put the banner down, Principal Morse confiscated it and instructed Frederick to accompany her to her office. App. 25a. Frederick walked the other way. *Id.*

Frederick was later removed from class and brought to the principal's office.[5] Principal Morse again explained that the banner was inappropriate in that it violated the school's policy against displaying offensive material, including material that advertises or promotes the use of illegal drugs. App. 3a; SER 8-9. After further discussing the incident with a defiant and uncooperative Frederick, Principal Morse suspended him for ten days based on multiple counts, including refusal to respond to a staff directive, truancy/skipping, defiance/disruptive behavior, and refusal to cooperate, in addition to the underlying charge of displaying the offensive banner.[6] App. 59a, 66a-67a.

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[5] The parties' versions of the events in question differ in that Frederick claims he went to Principal Morse's office on his own, whereas Principal Morse contends that she had to look up Frederick's schedule and remove him from class. *Id.* Neither the district court nor the court of appeals deemed it necessary to resolve this factual dispute.

[6] Frederick claims that his suspension was increased from five days to ten days because he quoted Thomas Jefferson in his (Frederick's) colloquy with Principal Morse. App. 3a. For her part, Principal Morse does not recall such a quote and denies punishing Frederick on such grounds. *Id.* Indeed, school records are devoid of any evidence that Frederick was suspended for quoting Mr. Jefferson. As noted by the district court, Frederick's own testimony was to the effect that his suspension was enhanced for his refusal to cooperate. App. 38a-39a. In any event, the Ninth Circuit ultimately concluded that any dispute over the purported punishment for quoting Mr. Jefferson was immaterial. App. 3a.

Following the banner episode, school personnel reported incidents of pro-drug graffiti in the halls and on school grounds. App. 2a; SER 68.

B. Procedural History

1. Frederick appealed his suspension to Superintendent Gary Bader. App. 25a. In a seven-page response analyzing Principal Morse's discipline of Frederick in view of school board policies and this Court's precedents, Superintendent Bader upheld the Principal's decision. App. 59a-67a. He did, however, reduce the suspension to time served (eight days). App. 25a, 67a.

2. Frederick appealed to the School Board. App. 26a. Following a lengthy hearing that included witness testimony and legal argument from counsel for Frederick and for the district administration, the School Board unanimously upheld Superintendent Bader's decision. App. 26a, 69a.

3. Frederick filed suit in the United States District Court for the District of Alaska. On May 27, 2003, following cross-motions for summary judgment, Chief Judge John W. Sedwick issued an opinion granting petitioners' motion. App. 23a-40a; *see also* App. 41a-42a. On May 30, 2003, the district court entered judgment dismissing the action. App 43a-44a.

Chief Judge Sedwick concluded that petitioners did not in any fashion violate Frederick's First Amendment rights. The district court reasoned that the banner's message could be constitutionally prohibited under this Court's ruling in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). App. 33a-38a. *Fraser*, the district court explained, allows a public school to regulate speech that it reasonably interprets as "plainly offensive" because such speech "might undermine the school's basic educational mission." App. 36a. The court noted that Frederick's banner "directly contravened the Board's policies relating to drug abuse

prevention" and thus interfered with the school's educational mission to deter illegal drug use. App. 35a-36a. The court highlighted the broad interpretations given to *Fraser*, such as in *Boroff v. Van Wert City Board of Education*, 220 F.3d 465 (6th Cir. 2000), where the Sixth Circuit concluded that a school could prohibit t-shirts depicting a rock band that promoted a drug-using lifestyle. App. 36a.

The district court further observed that *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), justified Principal Morse's actions. App. 35a-36a. In the court's view, *Tinker* allows schools to curtail speech that interferes with a school's work and, "[w]ithout a doubt, part of the school's work is to deter drug and alcohol abuse." App. 36a. Underlying the court's First Amendment analysis was an acknowledgement of the importance of deferring to school administrators' reasonable judgments where, as here, Frederick chose to display his banner at a "school-sponsored" activity. App. 33a-38a.

The district court also concluded, under both this Court's precedents and Alaska law, that petitioners were immune from any claim for money damages. App. 27a-32a. The court noted that (i) there was no case law on point to establish that Principal Morse's actions were unconstitutional; (ii) the cases cited by Frederick were all distinguishable; and (iii) Principal Morse's actions were not "so far-fetched as to make the illegality apparent." App. 27a-30a. Quite the contrary, the court observed that existing case law "shows that it was objectively reasonable for defendants to believe that their actions were proper." App. 28a.

4. On appeal, the Ninth Circuit reversed. The court of appeals found that the incident occurred while Frederick was a student and school was in session and that, accordingly, the case was to be resolved by applying "student speech"

doctrine under *Tinker*, *Fraser*, and *Kuhlmeier*.[7] App. 1a, 5a-6a. The court further assumed that Principal Morse correctly interpreted the phrase "BONG HITS 4 JESUS" as "express[ing] a positive sentiment about marijuana use." App. 6a-7a. The panel ruled, however, that the district court incorrectly applied the "plainly offensive" standard from *Fraser*. In the court of appeals' view, *Fraser* was inapplicable. The court narrowly interpreted *Fraser* as only allowing prohibitions on student speech of a "sexual nature." App. 9a. Applying that circumscribed standard, the court stated: "Frederick's speech was not sexual (sexual speech can be expected to stimulate disorder among those new to adult hormones)." *Id.* According to the panel, the district's policy of suppressing pro-drug messages, on the other hand, was just one of any number of "social message[s] contrary to the one favored by the school," and a school district is "not entitled to suppress speech that undermines whatever mission it defines for itself." App. 7a, 12a.

The court of appeals further reasoned that *Kuhlmeier* was inapplicable. App. 10a-11a. Whereas *Kuhlmeier* allows regulation of school-sponsored speech, 484 U.S. at 273, the panel noted that, here, Frederick displayed the banner off school property, in what it characterized as a "non-curricular activity" that was only "partially supervised." App. 17a.

Having eliminated *Fraser* and *Kuhlmeier* as bearing on the issue at hand, the Ninth Circuit concluded that the case was governed solely by *Tinker*. Under the rationale of that

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[7] The court of appeals variously referred to the Olympic Torch Relay as a an event sponsored by "Coca-Cola" and other "private" companies. App. 2a, 11a, 12a. At the same time, the Ninth Circuit concluded that "[t]his is a First Amendment student speech case" with the First Amendment providing the operative jurisprudential framework for analysis. App. 1a, 5a-6a; *see also* App. 33a-35a (district court's finding that the Olympic Torch Relay was a "school-sponsored" activity).

watershed decision, the court opined that petitioners could not punish Frederick for displaying his banner absent a showing that the banner "disrupts the good order necessary to conduct [the school's] educational function." App. 11a. The panel concluded that petitioners could not demonstrate that requisite element of "disruption," and that they therefore violated Frederick's First Amendment rights. App. 18a. In short, the Ninth Circuit discerned no difference between Frederick's pro-drug message and the anti-war armband passively worn by John Tinker as a form of political expression. App. 8a, 11a.

The court of appeals further concluded that Principal Morse was not entitled to qualified immunity. In the panel's view, the case law "succinctly explained how to apply the various Supreme Court doctrines . . . , thus ensuring that opacity in this particular corner of the law has been all but banished." App. 20a. Having found a constitutional violation, the court determined that Principal Morse violated Frederick's "clearly established rights." App. 20a. The panel thus vacated the district court's judgment and remanded to determine Frederick's monetary damages. App. 22a.

5. The Ninth Circuit subsequently denied the petition for rehearing and rehearing en banc. App. 45a-46a.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. *First*, the Ninth Circuit's decision, as a practical matter, renders long-standing, commonplace school policies against pro-drug messages unenforceable. While lower courts throughout the country have struggled in applying this Court's student speech precedent, courts have nonetheless found their way to upholding *bans* on messages promoting illegal substances (because such messages are so antithetical to the learning environment). The Ninth Circuit has now profoundly disrupted this settled understanding.

This case presents the Court with a much-needed opportunity to resolve a sharp conflict among federal courts (and to eliminate confusion on the part of school boards, administrators, teachers, and students) over whether the First Amendment permits regulation of student speech when such speech is advocating or making light of illegal substances.

Second, the Ninth Circuit's qualified immunity analysis unsparingly allows no room for reasonable error on the part of public school officials. Indeed, in the Ninth Circuit, school officials are held to a higher standard than federal judges. When the Ninth Circuit opined that "no reasonable government official could have believed the censorship and punishment of Frederick's speech to be lawful," App. 21a, the court blinked at the telltale fact that a respected federal district court judge, in a thorough opinion, had upheld Principal Morse's actions as entirely proper under the First Amendment. To make bad matters worse, the Ninth Circuit precipitously jumped from its flawed First Amendment conclusion to an automatic finding that Principal Morse violated a "clearly established right" — even though no Ninth Circuit authority was on point; even though other courts have consistently upheld schools' curtailment of pro-drug messages; and even though Principal Morse was faithfully enforcing the school board policies as written. *Frederick*'s qualified immunity analysis creates a dangerous precedent, deeply alarming to school administrators throughout the country. The case cries out for this Court's review.

I. THE COURT SHOULD CLARIFY WHETHER THE FIRST AMENDMENT REQUIRES PUBLIC SCHOOLS TO TOLERATE MIXED MESSAGES ABOUT ILLEGAL DRUG USE.

1. In the two decades since this Court last provided substantive guidance in the area of student speech, lower courts grappling with the First Amendment rights of public

high school students generally have analyzed disputes under the so-called *Tinker-Fraser-Kuhlmeier* trilogy.

Student speech cases start with the Vietnam War-era decision of *Tinker*. Recognizing that students do not shed their free speech rights at the schoolhouse gate, the *Tinker* Court upheld the right of students to wear anti-war armbands. 393 U.S. at 506. The Court found that passively wearing black armbands was akin to pure political speech, which is entitled to comprehensive protection. *Id.* at 505-06. On the other hand, the Court acknowledged the unique characteristics of a school and that administrators and teachers may suppress student conduct, whether in class or out of it, that would disrupt school operations. *Id.* at 511-13. In *Tinker*, however, there was no evidence that the silent, passive expression of opinion intruded upon the work of the school. *Id.* at 508.

Almost two decades later, the Court clarified in *Fraser* that schools may suppress vulgar, lewd, indecent, obscene, and plainly offensive student speech, even absent a showing of disruption. 478 U.S. at 683-84. Such speech, ruled the Court, "would undermine the school's basic educational mission" and "is wholly inconsistent with the 'fundamental values' of public school education." *Id.* at 685-86. Applying that principle, the *Fraser* Court upheld a school's right to discipline a student for delivering a sexually suggestive nominating speech for a student government candidate at a school assembly. *Id.*

Finally, almost two decades ago in *Kuhlmeier*, the Court acknowledged that school officials are entitled to exercise pervasive control over speech that reasonably might be perceived to bear the imprimatur of the school so long as the curtailment of such speech is reasonably related to "legitimate pedagogical concerns." 484 U.S. at 273. In the *Kuhlmeier* Court's view, a school properly exercised its discretion in refusing to publish student articles on pregnancy

and divorce in a school-funded student newspaper. *Id.* at 276.

2. In determining the constitutionality of a school's speech regulation under this "trilogy," many courts have tended to examine whether the proscribed speech is (i) disruptive of schoolwork and discipline under *Tinker*, (ii) vulgar, lewd, indecent, obscene, or plainly offensive under *Fraser*, or (iii) reasonably perceived as school-sponsored under *Kuhlmeier*. Unfortunately for local school officials tasked with keeping order and inculcating values, not all student speech falls neatly into these three categories. Adhering to a rigid categorical analysis, as manifested by the Ninth Circuit in this case, leads to a result that is utterly unfathomable to conscientious school officials and jurisprudentially baffling to judges.

Indeed, in a dissent in another recent Ninth Circuit student speech case, Judge Kozinski commented on the difficulties faced by courts in attempting to classify student speech under the appropriate category:

> Reconciling *Tinker* and *Fraser* is no easy task. The Supreme Court majority in *Fraser* seems to have been influenced by the indecorousness of Fraser's comments, which referred to a fellow student in terms that could be understood as a thinly-veiled phallic metaphor. The curious thing, though, is that Fraser used no dirty *words*, so his speech could only have been offensive on account of the ideas he conveyed — the ideas embodied in his elaborate double-entendre.

Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1193 n.1 (9th Cir. 2006) (Kozinski, J., dissenting) (citations omitted). Judge Kozinski thus wonders whether "*Fraser* swallows up *Tinker*, by suggesting that some ideas can be excluded from the high school environment, even if they don't meet the *Tinker* standard." *Id.* This candid identification of doctrinal

fog infecting student speech jurisprudence is at stark odds with *Frederick*'s assertion that "opacity in this particular corner of the law has been all but banished." App. 20a.

a. In the context of regulating pro-drug messages in schools, courts have wrestled with the *Tinker-Fraser-Kuhlmeier* trilogy. Yet, the courts had reached a bottom-line consensus — at least prior to *Frederick*. Applying *Fraser*, several courts recognized that prohibitions on pro-drug messages are constitutional because such expression is offensive and inconsistent with the mission of schools to promote healthy lifestyles (including by seeking at every turn to combat substance abuse). *See, e.g., Boroff*, 220 F.3d at 471 (upholding ban on Marilyn Manson t-shirts because singer promoted drug use),[8] *cert. denied*, 532 U.S. 920 (2001); *Nixon v. N. Local Sch. Dist.*, 383 F. Supp. 2d 965, 971 (S.D. Ohio 2005) ("Examples [of offensive speech under *Fraser*] are speech containing vulgar language, graphic sexual innuendos, or speech that promotes suicide, drugs, alcohol, or murder."); *Guiles v. Marineau*, 349 F. Supp. 2d 871, 881 (D. Vt. 2004) (accepting school's judgment that drug images on student's t-shirt were offensive under *Fraser*); *Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 859 (E.D. Mich. 2003) ("[W]hen student speech is . . . lewd, obscene, or vulgar (including related to alcohol or drugs), school officials may curtail that speech."); *Gano v. Sch. Dist. No. 411*, 674 F. Supp. 796, 798-99 (D. Idaho 1987) (upholding prohibition of t-shirt depicting drunken

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[8] Even the dissent in *Boroff* found agreement with the majority that a school could prohibit pro-drug messages. 220 F.3d at 474 (Gilman, J., dissenting) ("If the majority is suggesting that the School could have concluded that Marilyn Manson's apparent endorsement of, say, illegal drug use, makes his picture an unacceptable image for students to wear in high school, I would agree.").

administrators under *Fraser*, noting that schools have duty to teach about harmful effects of alcohol).

Other courts reached the same result in applying *Tinker*; those courts observed that there can be little dispute that messages promoting illegal substances cause disruption to schools. For example, the Fourth Circuit, in a pre-*Fraser* opinion, took judicial notice that messages promoting drug use endanger students' health and safety. The court held, accordingly, that a school could prohibit distribution of an underground newspaper containing advertisements for drug paraphernalia. *Williams v. Spencer*, 622 F.2d 1200, 1205-06 (4th Cir. 1980); *cf. McIntire v. Bethel Sch.*, 804 F. Supp. 1415, 1420-21, 1426 (W.D. Okla. 1992) ("Reasonable school officials could forecast that the wearing of clothing bearing a message advertising an alcoholic beverage would substantially disrupt or materially interfere with the teaching of the adverse effects of alcohol and that its consumption by minors is illegal and/or would substantially disrupt or materially interfere with school discipline.").

So too, in *Kuhlmeier*, this Court singled out pro-drug speech as a type of student expression that schools must have latitude in regulating: "A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use . . . ." 484 U.S. at 272; *see also Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1219 (11th Cir. 2004) (approving viewpoint discrimination in school-sponsored speech to forbid pro-drug messages); *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991) (permitting school policy banning ads in school publications for tobacco and liquor products); *McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918, 920 (E.D. Mo. 1999) (upholding prohibition against school band playing song "White Rabbit" because it might "reasonably be perceived" to advocate the use of illegal drugs).

b. Commentators likewise have acknowledged that schools enjoy the prerogative of proscribing student speech that supports drug, alcohol, or tobacco use. *See, e.g.*, 1 Ronna Greff Schneider, *Education Law: First Amendment, Due Process and Discrimination Litigation* § 2:3 (2006) ("The determination of what constitutes lewdness or vulgarity is within the role of the school board rather than the courts. . . . [C]ourts have upheld school prohibitions of wearing t-shirts that may . . . compromise the school's ability to teach substance abuse . . . ." (citations omitted)); Susannah Barton Tobin, Note, *Divining Hazelwood: The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 Harv. C.R.-C.L. L. Rev. 217, 238 (2004) ("[T]he Court seemed prepared to allow the school to censor viewpoint-based student speech that might appear to advocate the use of alcohol or drugs."); Perry A. Zirkel, *Censoring or Censuring Student Speech: A Checklist*, 121 Educ. L. Rep. 477, 479 (1997) (setting forth an annotated flowchart for education practitioners, which, among other things, asks: "Is the student's expression lewd or otherwise offensive — e.g., based on sex, alcohol/drugs, or violence? . . . If YES and you[] are sued, you're likely to win." (citations omitted)).

c. School board policies across the country are largely in accord with Juneau's. While daunting to quantify with precision the number of school districts that prohibit advertisements or depictions of illegal substances, available statistics indicate that the Ninth Circuit's ruling would call into question the enforcement of standard policies adopted by the vast majority of public schools across the nation.

For example, in Arizona, which has its individual school policies available online, at least 90% of schools have anti-substance dress code policies (e.g., "Obscene language or symbols, or symbols of sex, drugs, or alcohol on clothing are expressly prohibited."). *See* Arizona School Board

Association Manuals, http://lp.ctspublish.com/asba/public/lpext.dll?f=templates&fn=main-h.htm.[9] And the standard policy adopted by most Arizona schools further provides that such rules shall be in effect during school hours and at all school-related functions. *Id.*

Similarly, the California School Boards Association's model policies provide that "[c]lothing, jewelry and personal items (backpacks, fanny packs, gym bags, water bottles etc.) shall be free of writing, pictures or any other insignia . . . which bear drug, alcohol or tobacco company advertising, promotions and likenesses" and further states that such rule "shall apply to all regular school activities." CSBA Sample Administrative Regulation § AR5132 (2001).

School officials in Arizona and California, which are bound by *Frederick*'s rigid analytical framework, would face a vexing dilemma. As a practical matter, the Ninth Circuit's ruling eviscerates the enforcement of such policies as written, unless school officials are confident that they can prove substantial and material disruption to school operations. Though *Frederick* stopped short of opining whether a t-shirt emblazoned with "BONG HITS 4 JESUS" could be constitutionally prohibited, the rationale of *Frederick* is equally applicable to clothing. Whether on a banner or on a t-shirt, whether in school or at an off-campus school activity, *Frederick* tells schools that they can no longer rely on the fact that illegal drugs undermine the educational mission of the schools. Rather, they must be prepared to defend their

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[9] Of the 230 Arizona school district policies listed on this website, 207 have anti-substance dress code policies, 195 of which contain the State's standard language as quoted above and 12 of which have their own unique language. The other 23 schools do not have such policies, but, of these, 14 have school uniform policies that excuse the need for anti-substance dress code policies.

enforcement of such policies by producing substantial and material evidence of disruption in a court of law.

Meanwhile, outside the Ninth Circuit, school officials must consider whether they are willing to face the same fate as Principal Morse, in view of the underdeveloped (and now confused) state of the law. Again, the number of such officials who potentially could run afoul of the *Frederick* standard is extraordinarily high.

In Texas, for example, approximately 99% of public school districts have adopted the Texas Association of School Board's recommended policy language. That model policy prohibits clothing "advertising or depicting tobacco products, alcohol, or drugs" and applies during school and may be enforced during extracurricular activities.[10]

Published research examining such policies similarly shows that such regulations are widely prevalent. An empirical study on student handbooks in Illinois found that 83.75% of a sampling of schools prohibited messages promoting drugs or alcohol. Jane E. Workman & Beth Winfrey Freeburg, *Safety and Security in a School Environment: The Role of Dress Code Policies*, J. Fam. & Consumer Sci., April 1, 2006, at 19. Another study based on questionnaires of a randomly-selected national sample of principals found that the prohibition of expression related to illegal substances was one of the "most frequently" occurring

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[10] The Texas Association of School Boards Policy Service, which offers model local policies to school districts in Texas, also maintains the policy manuals (most of which are online or otherwise retrievable using search engines) for all 1,036 Texas school districts. *See* TASB Policy Service, http://www.tasb.org/services/policy/index.aspx; *see also* Tex. Educ. Agency, Texas Education Directory, http://askted.tea.state.tx.us/org-bin/school/SCHOOL_RPT?Y::All::DistDirectory. Approximately 1,025 of these districts have adopted TASB's recommended anti-substance dress code language (found at code "FNCA" in school policy manuals).

categories for student dress codes: "Statements, depictions, and/or advertisements for drugs, alcohol, and tobacco products were prominently banned." Todd A. DeMitchell et al., *Dress Codes in the Public Schools: Principals, Policies, and Precepts*, 29 J.L. & Educ. 31, 42-43 (2000).

Additionally, numerous state school board associations promulgate guidelines and model policies, which are illustrative of the policies typically found in schools in those States. The New York State School Boards Association, for instance, recommends that schools adopt a policy that "[a] student's dress, grooming and appearance, including hair style/color, jewelry, make-up, and nails, shall ... [n]ot promote and/or endorse the use of alcohol, tobacco or illegal drugs and/or encourage other illegal or violent activities." NYSSBA Sample Policy § 5300.25 (2006). And that policy is prefaced by an admonition that "this code applies to all students, school personnel, parents and other visitors when on school property or attending a school function." § 5300.05.

Likewise, the Wisconsin Association of School Boards provided the following example of an acceptable implemented policy for regulating student dress: "[S]tudents are prohibited from wearing clothing that ... promotes, depicts or advertises alcohol, drugs, [or] tobacco products .... The policy applies during the school day, in school buildings and vehicles, and at all school-sponsored activities." Wis. Ass'n Sch. Bds., *Regulating Dress and Grooming*, The Focus, Dec. 2003, at 5.

Examples of such school policies can be found in every federal judicial circuit. These policies illustrate a heretofore settled understanding that schools enjoy authority to proscribe student expression promoting illegal substances without any heightened evidentiary requirement (of showing disruption to school operations). The Ninth Circuit has dramatically altered the legal landscape. The *Frederick*

decision appears to be the first case in American jurisprudence that any court — federal or state — has denied public school officials the authority to proscribe pro-drug messages. At a minimum, the Ninth Circuit's opinion is the most far reaching limitation to date on the authority of school boards, principals, and teachers to regulate student expression advocating illegal substances.

3. Contrary to the Ninth Circuit's inflexible approach in *Frederick*, this Court repeatedly has acknowledged that school officials enjoy considerable deference in carrying out their demanding and sensitive responsibilities. The Court has recognized the importance of school officials' "comprehensive authority . . . , consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools," *Tinker*, 393 U.S. at 507; that schools should be accorded a "certain degree of flexibility," *Fraser*, 478 U.S. at 686 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985)); and that the First Amendment rights of public school students must be "applied in light of the special characteristics of the school environment." *Kuhlmeier*, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 506). *See also Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 646 (1999) ("We have observed, for example, 'that the nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.'" (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995))); *Bd. of Educ. v. Pico*, 457 U.S. 853, 863 (1982) ("The Court has long recognized that local school boards have broad discretion in the management of school affairs.").

Frederick's non-deferential approach is at war with this Court's pronouncements. It conveys a muddled message as to what constitutes permissible school speech, particularly in view of Congressional encouragement and the widespread

adoption of school policies restricting pro-drug speech. The time is ripe for this Court to clarify ambiguities infecting the law of schoolhouse speech over the last two decades. To that needed end, this case presents an appropriate vehicle for delineating the reach of the Free Speech Clause in proscribing messages promoting illegal substances.

Specifically, the Court can (and should) clarify the relevance, if any, of *Tinker* in situations that do not involve a specific evidentiary showing of disruption. The Court also can clarify the relevance, if any, of *Fraser* in categorizing pro-drug messages as plainly offensive. Finally, the Court can clarify the relevance, if any, of *Kuhlmeier* in situations where students broadcast messages during supervised school activities and where they are, in effect, representing their school to the public at large.

4. It is of central importance to our nation's school districts that they receive definitive guidance from this Court on the extent of their ability to regulate expression advocating drugs and other illegal substances. After all, fighting teenage substance abuse constitutes "a pressing concern in every school." *Bd. of Educ. v. Earls*, 536 U.S. 822, 834 (2002); *see also Vernonia*, 515 U.S. at 661-62 ("[T]he necessity for the State to [counter the effects of drugs in schools] is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction.").

Messages matter. As Congress recognized in passing the Safe and Drug Free Schools and Communities Act, 20 U.S.C. § 7101 *et seq.*, drug use is a social phenomenon. To state the painfully obvious, impressionable adolescents face strong pressures to use drugs as they confront pro-drug messages from peers, adults, and the media. In view of the devastating impact illegal drug use has both on students and the learning environment, schools should be afforded significant latitude

in discouraging substance abuse. Part of maintaining a drug-free environment is ensuring that students are not confronted with inconsistent messages, particularly while school is in session.

5. Courts have recognized that speech promoting drugs, alcohol, and tobacco — particularly when targeting an audience of children — ought to be treated differently. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 599 (2001) (Souter, J., concurring in part and dissenting in part) ("[F]ew interests are more 'compelling,' than ensuring that minors do not become addicted to a dangerous drug before they are able to make a mature and informed decision as to the health risks associated with that substance ...."); *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325 (4th Cir. 1996) (upholding city ordinance banning outdoor alcohol advertising in certain areas where children are likely to be present). By refusing to differentiate the pro-drug message on Frederick's banner from the armbands in *Tinker*, the Ninth Circuit trivializes the drug crisis in our nation's schools. To make matters even worse, the court below ignores this Court's and Congress' support for efforts to eliminate drugs and pro-drug messages from the educational setting. Schools should not be required to tolerate pro-drug messages, particularly when they are under federal mandate to maintain a clear and consistent message that illegal drug use is wrong and harmful.

II. THE DECISION BELOW RADICALLY DEPARTS FROM WELL-ESTABLISHED PRINCIPLES OF QUALIFIED IMMUNITY.

1. Principal Morse was in a situation all too familiar to school administrators. She was responsible for maintaining order at a gathering of hundreds of students and was suddenly confronted with a disruptive situation. Her response was to follow school board policies to the letter. Not only does Juneau School Board Policy 5520 "prohibit[]

any assembly or public expression that . . . advocates the use of substances that are illegal to minors," Policy 5850 explicitly states that a student such as Frederick who was "participat[ing] in [an] approved social event[]" is "subject to district rules for student conduct." App. 53a, 58a. As we have seen, such policies are commonplace in public school systems throughout the country. In addition, this Court has stated repeatedly that local school officials are to be accorded considerable deference in managing student conduct.

Not surprisingly, then, Principal Morse's decision to confiscate Frederick's banner and suspend him based on his cumulative infractions was sustained by Superintendent Bader. Following a full hearing, the School Board likewise upheld her actions without dissent. Principal Morse's decision was yet again tested and upheld by a federal district court judge who, in a fourteen-page summary judgment ruling, concluded that Principal Morse "had the authority, if not the obligation, to stop such messages at a school sanctioned activity." App. 37a.

The Ninth Circuit ultimately concluded that Principal Morse, Superintendent Bader, the Juneau School Board, and Chief Judge Sedwick all misapprehended the law. But when the Ninth Circuit further found that Principal Morse violated Frederick's "clearly established rights" (and is therefore liable for damages), the court departed from important guiding principles of the qualified immunity doctrine. Notably, "[i]f judges . . . disagree on a constitutional question, it is unfair to subject [governmental actors] to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). Here, the Ninth Circuit holds Principal Morse to a higher standard on understanding the law than a highly respected federal district court judge with over a decade's experience on the bench. That should not be.

2. The Ninth Circuit's error stems from the manner in which it recast this Court's two-part qualified immunity test from *Saucier v. Katz*, 533 U.S. 194 (2001). In *Saucier*, this Court rejected the Ninth Circuit's qualified immunity test because it improperly fused the question whether a constitutional violation occurred with the question whether the defendant had qualified immunity. The Ninth Circuit's framing of the qualified immunity doctrine in *Frederick* suffers from the same analytical flaw.

Frederick fashions a three-part test from *Saucier*:

> First, we must determine whether the facts alleged show Morse's conduct violated a constitutional right. Second, we must determine whether the right was clearly established at the time of the alleged violation. Finally, we must determine whether it would be clear to a reasonable principal that her conduct was unlawful in the situation she confronted.

App. 18a-19a (citations and internal brackets and quotation marks omitted).

a. The Ninth Circuit began its qualified immunity analysis by restating its hindsight determination that Principal Morse violated Frederick's First Amendment rights — a determination that relied, in part, on case law decided after the January 24, 2002 incident, as well as a case still pending appeal at that time. *See* App. 9a n.14 (citing *Noy v. State*, 83 P.3d 545 (Alaska Ct. App. 2003)), 14a & n.32 (citing *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981 (2001), *cert. denied*, 536 U.S. 959 (2002)), n.33 (citing *Newsome v. Albemarle County Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003)), 15a & n.38 (citing *Scott v. Sch. Bd. of Alachua County*, 324 F.3d 1246 (11th Cir. 2003)); 15a-16a n.40 (citing *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 257 (3d Cir. 2002))).

b. The court of appeals next determined that Frederick's right to display a large banner proclaiming "BONG HITS 4 JESUS" during schools hours at a school-sanctioned and supervised event was "clearly established." The panel conceded that there was "no Ninth Circuit authority precisely on point" and offered only that "what we do have is consistent with the above analysis." App. 12a. Finding precedent that may be "consistent with" a certain conclusion is emphatically not the test for determining a "clearly established right." Denial of a governmental actor's qualified immunity cannot rest on previously articulated general principles, but instead requires a greater degree of specificity that would put the government actor on notice. *Saucier*, 533 U.S. at 201. If no precedent is on point, there must at least be precedent finding "a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand." *Id.* at 202-03. No such case law existed. Prior to *Frederick*, no court had rejected the authority of public schools to regulate student speech promoting illegal drugs.[11]

The Ninth Circuit attempted to bolster its opinion that Principal Morse violated a "clearly established right" by making two irrelevant observations. *First*, the panel noted that Principal Morse admitted to being aware of this Court's opinions in *Tinker*, *Fraser*, and *Kuhlmeier* from her "advanced school law" course. App. 20a. That misses the analytical mark. Principal Morse's subjective beliefs do not matter in a test that turns on "objective legal reasonableness."

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[11] Alluding to *Frederick*, Judge Kozinski opined that whether a student's t-shirt was "plainly offensive" under *Fraser* was, "[u]ntil recently, . . . a closer question." *Harper*, 445 F.3d at 1193 (Kozinski, J., dissenting). Judge Kozinski candidly recognized that, at the time of the incident in *Frederick*, the parameters of "plainly offensive" speech under *Fraser* were still in flux.

Wilson, 526 U.S. at 614. In any event, her subjective belief was that she had correctly applied general principles of law. *Second*, the panel noted that "the only times other circuit courts have held that conduct like Morse's is not a constitutional violation, they have done so under facts 'distinguishable in a fair way from the facts presented in the case at hand.'" App. 19a. Whether case law supporting the constitutionality of Principal Morse's actions is "distinguishable in a fair way" may matter to the determination of whether there has been a constitutional violation, but it matters little in analyzing qualified immunity.

c. The Ninth Circuit turned, finally, to what it identified as the third part of its qualified immunity test, but which is actually the analysis that this Court requires for determining whether a right is "clearly established" — whether the unlawfulness of the scrutinized conduct would be clear to a reasonable public official in the specific circumstances at hand. *Saucier*, 533 U.S. at 202. In a pivotal move, the panel turned away from any substantive analysis under this critical step: "Once we have held that 'the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing [the official's] conduct.'" App. 21a (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). By this approach, the Ninth Circuit effectively eliminated the most important step in the qualified immunity analysis.

In sum, the Ninth Circuit's qualified immunity analysis in *Frederick* revives the cardinal sin committed in *Saucier*. The panel confused general propositions for a "clearly established right" and failed to make an appropriately particularized finding as to whether a reasonable principal in Ms. Morse's position would have concluded that her discipline of Frederick was unlawful.

3. The Ninth Circuit thereby set a perilous example for other courts to follow. Under the *Frederick* standard, governmental actors faced with legal uncertainty will have to predict the future course of constitutional law under penalty of harsh civil damages lawsuits. This disruptive jurisprudential development in the multi-State mega-Circuit of the Ninth threatens to compromise public school administration in the West — and beyond — in a fundamental way. A critical "goal of qualified immunity [is] to 'avoid excessive disruption of government.'" *Saucier*, 533 U.S. at 202 (quoting *Harlow*, 457 U.S. at 818). In our litigious culture, "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). This problem is especially pronounced here, where the law governing student speech is still relatively undeveloped, and manifestly so since this Court has not provided substantive guidance in almost twenty years. School administrators have a difficult enough job maintaining order without the daunting threat of liability for damages solely because their legal sophistication does not allow them to predict the future course of appellate jurisprudence.

4. In view of the manifest error infecting the Ninth Circuit's qualified immunity analysis, this Court may wish to consider summary reversal. At a minimum, the Court should grant review to provide much-needed guidance on (i) the meaning of a "clearly established right" and (ii) whether, in light of the broad latitude traditionally accorded public school officials in their day-to-day discretionary functions, the qualified immunity doctrine should be applied more flexibly in the sensitive context of public school education.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari. The Court may also wish to consider summary reversal.

Respectfully submitted,

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August 28, 2006

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED MARCH 10, 2006

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH FREDERICK,

Plaintiff-Appellant,

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,

Defendants-Appellees.

No. 03-35701.

Argued and Submitted July 8, 2004. Filed March 10, 2006.

Appeal from the United States District Court for the District of Alaska; John W. Sedwick, District Judge, Presiding. D.C. No. CV-02-00008-J-JWS.

Before: HALL, KLEINFELD, and WARDLAW, *Circuit Judges*.

KLEINFELD, *Circuit Judge*:

This is a First Amendment student speech case.

Appendix A

Facts

One January day, Coca-Cola and other private sponsors supported a "Winter Olympics Torch Relay" in Juneau, Alaska. Students were released from school so that they could watch the Olympic torch pass by. Joseph Frederick, then an 18-year-old senior at Juneau-Douglas High School, never made it to school that morning because he got stuck in the snow in his driveway, but he made it to the sidewalk, across from the school, where the torch would pass by. He and some friends waited until the television cameras would catch it, then unfurled a banner reading "Bong Hits 4 Jesus." Deborah Morse, the school principal, crossed the street, grabbed and crumpled up the banner, and suspended Frederick for ten days. He appealed the suspension administratively, but it was sustained. He then filed a 42 U.S.C. § 1983 action in the Federal District Court seeking declaratory and other relief.

There was disorder at the torch passing, but the uncontradicted evidence is that it had nothing to do with Frederick and his fellow sign-holders. Coca-Cola handed out samples in plastic bottles, and students threw them at each other. Students threw snowballs. Some students got into fights. But Frederick and his group did not participate in these disorders, saving their energy for what they hoped would be their nationally televised sign display. And, the disruption that took place occurred before the display of the banner, so it could not have been caused by it.

In subsequent days, there was some pro-drug graffiti in the high school which the principal thought was "sparked" by the banner, but the principal did not rip down the sign at the rally because she anticipated or was concerned about such possible consequences. When Principal Morse crossed the

street from the school and confronted Frederick about the banner, he asked "What about the Bill of Rights and freedom of speech?" She told him to take the banner down because she "felt that it violated the policy against displaying offensive material, including material that advertises or promotes use of illegal drugs," and she grabbed it from him and crumpled it up.

In their answers to interrogatories, Appellees never contend that the display of the banner disrupted or was expected to disrupt classroom work. Asked for all the ways in which the banner display disrupted the educational process, they said:

Display of the banner would be construed by many, including students, district personnel, parents and others witnessing the display of the banner, as advocating or promoting illegal drug use which is inconsistent with the district's basic educational mission to promote a healthy, drug-free life style. Failure to react to the display would appear to give the district's imprimatur to that message and would be inconsistent with the district's responsibility to teach students the boundaries of socially appropriate behavior.

There are some genuine disputes about the facts, but they are not material to the resolution of this case. Frederick says that the principal initially told him that he was suspended for five days, but when he quoted Thomas Jefferson to her, she doubled it. The principal says that she does not remember whether he quoted Jefferson to her, but that was not why the suspension was ten days. Frederick says that an assistant principal told him that the Bill of Rights does not exist in schools and does not apply until after graduation, but Principal Morse says that the assistant principal "made some remark to the effect that students do not have the same first amendment rights as adults." Frederick says that students

were simply released from school so that they could watch the privately sponsored Olympic Torch being carried through a public street, and a student affidavit he submitted pointed out that the students did not have to obtain parental permission slips to be released, as is the routine for field trips and other supervised events off of the school premises. Principal Morse says that the release was "an approved social event or class trip," noting that the pep band played as the torch passed the school, the cheerleaders were out in uniform to greet the torchbearers, and teachers supervised.

Frederick says (without contradiction) that he had not gone to school that day prior to the banner display, that the banner display was off school property across Glacier Avenue from the campus, and that there were a lot of people, students and non-students, there to watch the torch pass. Other students filed affidavits saying that they were just released, not required to stay together or with their teachers, except for the gym class, and school administrators did not attempt to stop students who got bored and left. Frederick says that the "Bong Hits 4 Jesus" language was designed to be meaningless and funny, in order to get on television, but Principal Morse says that "bong hits" means puffs of marijuana and the words promote marijuana use.

Frederick was suspended for ten days, and appealed unsuccessfully through all levels of available administrative and school board review. He sued under 42 U.S.C. § 1983 for a declaratory judgment that his First Amendment rights had been violated, an injunction to remove the reference to the ten day suspension from his school records, damages, and other relief. The district court granted summary judgment for the Appellees, on the grounds that no constitutional rights were violated and the Appellees had qualified immunity even if they were. Frederick appeals.

Appendix A

Analysis

We review a grant of summary judgment de novo.[1] The district court reasoned that *Bethel School District No. 403 v. Fraser*,[2] as opposed to *Tinker v. Des Moines Independent Community School District*,[3] governed Frederick's speech. We disagree.

One amicus, Drug Policy Alliance, argues that we should analyze this not as a student speech case, but simply as speech on a public sidewalk. That would make the case analogous to a student having an after-school job at a video store that rents out Cheech and Chong tapes, or a student driving a car on public streets with a "Bong Hits 4 Jesus" bumper sticker. Were this factually such a case, the law would be easy indeed, but the facts established by the submissions on summary judgment make this a student speech case. Even though Frederick never got to school that morning, that was only because he got stuck in his driveway because of the snow. School had started and the students were released to watch the Olympic torch pass. And even though supervision of most students was minimal or nonexistent, the school could have supervised them more if it chose to, as it did with the gym class and perhaps the pep

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[1] *Holley v. Crank*, 400 F.3d 667, 672 (9th Cir. 2005).

[2] *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (holding that the school district permissibly sanctioned a student for his sexually explicit speech at a school assembly).

[3] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514 (1969) (holding that students retain First Amendment expression rights at school, which may be suppressed only if authorities reasonably "forecast substantial disruption of or material interference with school activities").

band and cheerleaders. Frederick was a student, and school was in session.

There is no genuine issue of fact material to the decision. Frederick's display was not in a class. Frederick and the other students who displayed the sign did not participate in any of the disorderly conduct of the students who threw snowballs or plastic Coca-Cola miniature sample bottles. The school principal and school board do not claim that the display disrupted or was expected to disrupt any classroom work. They concede that their objection to the display, and the reason why the principal ripped down the banner, was not concern that it would cause disruption but that its message would be understood as advocating or promoting illegal drug use.[4] Frederick says that the words were just nonsense meant to attract television cameras because they were funny. We nevertheless proceed on the basis that the banner expressed a

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[4] The issue of "illegal" drug use is a little complicated under Alaska law. Alaska has an express constitutional right to privacy that the federal constitution does not have. The Alaska Supreme Court has held unanimously that the state had the burden of justifying its statute prohibiting marijuana use, and "no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home has been shown." *Ravin v. State*, 537 P.2d 494, 511 (Alaska 1975), followed in *Noy v. State*, 83 P.3d 545 (Alaska Ct. App. 2003). Frederick was an adult citizen of Alaska, not a minor, at the time he displayed the sign. The Alaska Supreme Court has also taken a libertarian position regarding schoolchildren, holding that no "compelling state interest" justified a school regulation on boys' hair length. *Breese v. Smith*, 501 P.2d 159 (Alaska 1972). Alaska has had repeated referenda about whether, and to what extent, to criminalize or legalize marijuana, *see Noy*, 83 P.3d at 545-46, so messages about marijuana have a degree of political salience to them and might be understood as political advocacy. We need not reach any questions of Alaska law.

positive sentiment about marijuana use, however vague and nonsensical.

Thus, the question comes down to whether a school may, in the absence of concern about disruption of educational activities, punish and censor non-disruptive, off-campus speech by students during school-authorized activities because the speech promotes a social message contrary to the one favored by the school. The answer under controlling, long-existing precedent is plainly "No."

Because this is a section 1983 case in which the Appellees asserted qualified immunity, we are required to proceed in accord with *Saucier v. Katz*[5] and determine first whether Frederick's constitutional rights were violated. This is an "as applied" challenge, not a "facial" challenge. Frederick argues that his rights were violated as the regulations were applied to him.[6] Under *Tinker v. Des Moines Independent Community School District*,[7] they plainly were.

In *Tinker*, the Supreme Court held that wearing black arm bands in high school, "unaccompanied by any disorder or disturbance on the part of [the arm-band wearers]," and unaccompanied by "interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone," was constitutionally

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[5] *Saucier v. Katz*, 533 U.S. 194 (2001).

[6] *See Vlasak v. Superior Court of Cal. ex rel. County of Los Angeles*, 329 F.3d 683, 688 (9th Cir. 2003).

[7] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

protected speech.[8] *Tinker* held that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."[9]

Tinker disposes of the School Board's argument that "school administrators were entitled to discipline Frederick's attempt to belittle and undercut this critical mission" of preventing use of illegal drugs by a sign that was "a parody of the seriousness with which the school takes its mission to prevent use of illegal drugs." Under *Tinker*, a school cannot censor or punish students speech merely because the students advocate a position contrary to government policy. The *Tinker* armbands were about war. Government has no mission in which victory is so important as war. The federal government was, at the time of the facts giving rise to the *Tinker* case, prosecuting a war. Government policy was to support and advance the effort to win the war. The black armbands in *Tinker* expressed hostility to the war. By doing so, they legitimized opposition and undermined support for the war. Yet the students in high school had a constitutional right to express their opposition to this critically important mission of the federal government.

The two leading Supreme Court cases that have held against students claiming First Amendment rights to speak in a way unacceptable to school administrators are distinguishable. *Bethel School District No. 403 v. Fraser*[10]

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[8] *Id.* at 508.

[9] *Id.* at 511.

[10] *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986)

held that a high school student did not have a First Amendment right to give a sexually suggestive nominating speech for a candidate for student office at a school assembly that "was part of a school-sponsored educational program in self-government," where disruption immediately ensued as the student gave the speech.[11] *Fraser* holds that high school students's rights to free speech in school are not coextensive with adults's rights, and "pervasive sexual innuendo" that is "plainly offensive . . . to any mature person" can be marked off as impermissible incivility within the school context.[12] *Fraser* focuses upon the sexual nature of the offensiveness in the in-school speech that can be punished, as contrasted with the "political viewpoint" of the speech protected in *Tinker*.[13] Our case differs from *Fraser* in that Frederick's speech was not sexual (sexual speech can be expected to stimulate disorder among those new to adult hormones), and did not disrupt a school assembly. Also, it is not so easy to distinguish speech about marijuana from political speech in the context of a state where referenda regarding marijuana legalization repeatedly occur and a controversial state court decision on the topic had recently issued.[14] The phrase "Bong Hits 4 Jesus" may be funny, stupid, or insulting, depending on one's point of view, but it is not "plainly offensive" in the way sexual innuendo is.

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[11] *Id.* at 677-78.

[12] *Id.* at 683.

[13] *Id.* at 685.

[14] *See Noy v. State*, 83 P.3d 545 (Alaska Ct. App. 2003)

Appendix A

Hazelwood School District v. Kuhlmeier[15] is similarly distinguishable. In *Kuhlmeier*, the Supreme Court held that high school students did not have a First Amendment right to publish articles on pregnancy and divorce in a school newspaper over the principal's objection, where the newspaper was produced in a class on journalism, edited by the journalism teacher as part of the teaching of the class, and paid for with school money.[16] The Court distinguished *Tinker* on the ground that "[t]he question whether the First Amendment requires a school to tolerate particular student speech-the question that we addressed in *Tinker*-is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."[17] This student newspaper was "part of the school curriculum."[18] Exclusion of any First Amendment duty to "promote" a student viewpoint means that a school necessarily retains authority to refuse to "sponsor" speech such as Frederick's, which arguably promotes drug use.[19] *Kuhlmeier* does not control the case at bar, however, because Frederick's pro-drug banner was not sponsored or endorsed by the school, nor was it part of the curriculum, nor did it take place as part of an official school activity. *Kuhlmeier* might apply had Frederick insisted on making his "Bong Hits 4 Jesus" banner in art class, but that is not what the record

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[15] *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)

[16] *Id.* at 268-73.

[17] *Id.* at 270-71.

[18] *Id.* at 271.

[19] *Id.* at 272.

shows. His display took place out of school while students were released so that they could watch a Coca-Cola and Olympics activity.

Leaving *Kuhlmeier* out of the analysis, because no sponsorship or curricular activity was involved, the question is how far *Tinker* goes to protect such student speech as Frederick's, and how far *Fraser* goes to protect school authority to censor and punish student speech that "would undermine the school's basic educational mission."[20] There has to be some limit on the school's authority to define its mission in order to keep *Fraser* consistent with the bedrock principle of *Tinker* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[21] Had the school in that case defined its mission as instilling patriotic duty or promoting support for national objectives, it still could not have punished the students for wearing the black arm-bands. All sorts of missions are undermined by legitimate and protected speech-a school's anti-gun mission would be undermined by a student passing around copies of John R. Lott's book, *More Guns, Less Crime*;[22] a school's anti-alcohol mission would be undermined by a student e-mailing links to a medical study showing less heart disease among moderate drinkers than teetotalers; and a school's traffic safety mission would be undermined by a student circulating copies of articles

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[20] *Fraser*, 478 U.S. at 685.

[21] *Tinker*, 393 U.S. at 506.

[22] John R. Lott, Jr., *More Guns, Less Crime* (1998).

showing that traffic cameras and automatic ticketing systems for cars that run red lights increase accidents.[23]

Public schools are instrumentalities of government, and government is not entitled to suppress speech that undermines whatever missions it defines for itself. What schools are entitled to do, as *Fraser* makes clear, is suppress speech that disrupts the good order necessary to conduct their educational function. No educational function was disrupted by the banner displayed during the Coca-Cola sponsored Olympics event. One can hypothesize off-campus events for which the students might be released that would be educational and curricular in nature and would be disrupted by speech such as Frederick's. For example, on a school field trip as part of the social studies curriculum to observe a court in session, it might be the case that the school could ban the wearing of Cohen's famous jacket.[24] But a Coca Cola promotion as the Olympic torch passed by on a public street was not such an event.

We have no Ninth Circuit authority precisely on point, but what we do have is consistent with the above analysis. In *Burch v. Barker*,[25] we held that a school could not require prior approval for a student newspaper produced outside the school before it was distributed on school grounds to students, distinguishing *Kuhlmeier* because "no one could associate [the newspaper] with school sponsorship or

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[23] *See, e.g.*, Virginia Transportation Research Council, *An Evaluation of Red Light Camera (Photo-Red) Enforcement in Virginia* (2005), http://virginiadot.org/vtrc/main/online-reports/05-r21.htm.

[24] *Cf. Cohen v. California*, 403 U.S. 15 (1971).

[25] *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988). F

endorsement."[26] *Burch* sorts the cases by the "distinction between school-sponsored as opposed to non-school-sponsored expression."[27] The school board and administrators properly control "what is taught," but "no similar content control is justified for communication among students which is not part of the educational program."[28] We held that the school should be enjoined to "purge the plaintiff-students' records of reprimands for violating the policy" of the school,[29] no doubt the source of Frederick's prayer for similar relief in this case.

We again upheld student speech rights in *Chandler v. McMinnville School District*.[30] When replacements were used during a teachers's strike, some students wore buttons calling the replacement teachers "scabs," and were suspended for refusing to take them off. Reversing the district court's dismissal of the student's complaint, we sorted the high school student speech cases in the following manner:

We have discerned three distinct areas of student speech from the Supreme Court's school precedents: (1) vulgar, lewd, obscene, and plainly offensive speech, (2) school-sponsored speech, and (3) speech that falls into neither of these categories. We conclude, as discussed below, that the standard for reviewing the suppression of

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[26] *Id.* at 1150

[27] *Id.* at 1157

[28] *Id.*

[29] *Id.* at 1159

[30] *Chandler v. McMinnville School District*, 978 F.2d 524 (9th Cir. 1992)

vulgar, lewd, obscene, and plainly offensive speech is governed by *Fraser*, school-sponsored speech by [*Kuhlmeier*], and all other speech by *Tinker*.[31]

Frederick's "Bong Hits 4 Jesus" falls into the third category-the speech controlled by *Tinker*. School officials have broader authority, we held in *LaVine v. Blaine School District*, where they act "not to punish . . . but to avert perceived potential harm."[32] But in Frederick's case, the school officials concede that they acted to punish speech inconsistent with the school's mission, not to avoid potential harm such as the feared school shooting in *LaVine*.

Our sister circuits have similarly held that student speech that is neither plainly offensive nor school-sponsored can be prohibited only where the school district demonstrated a risk of substantial disruption. For example, in *Newsom v. Albemarle County School Board*,[33] the Fourth Circuit addressed a school's ban on clothing depicting, among other images, weapons. *Newsom* had previously been required by an assistant principal to change out of a National Rifle Association T-shirt depicting "men shooting guns," and sought a preliminary injunction to prevent enforcement of the dress code.[34] As in Frederick's case, the school relied on the fact that the T-shirt conflicted with a "message" it was trying

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[31] *Id.* at 529 (citations omitted)

[32] *LaVine v. Blaine School District*, 257 F.3d 981, 983 (9th Cir. 2001).

[33] *Newsom v. Albemarle County School Board*, 354 F.3d 249 (4th Cir. 2003)

[34] *Id.* at 253-54

to impart, namely that "Guns and Schools Don't Mix."[35] The Fourth Circuit straightforwardly applied *Tinker*, distinguished *Fraser* and *Kuhlmeier*, and concluded that, because there was no evidence that clothes showing or mentioning weapons had ever substantially disrupted school operations, the school could not ban this expressive display of speech without impinging on the student's First Amendment rights.[36] The court wryly noted that the school's rigid dress code would prohibit a student from wearing a T-shirt depicting the insignia of a military unit in which a sibling might be serving, or even the official state seal.[37]

Likewise, in *Scott v. School Board of Alachua County*,[38] the Eleventh Circuit upheld suspensions imposed on students for displaying the confederate flag on school premises, where the school board's ban on confederate symbols was premised on the history of racial tension and fights at the school.[39] The Third, Sixth, and Tenth Circuits have similarly applied *Tinker*'s requirement that the speech or symbols to be censored must pose a legitimate likelihood of disruption.[40]

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[35] *Id.* at 252

[36] *Id.* at 260

[37] *Id.*

[38] *Scott v. School Board of Alachua County*, 324 F.3d 1246 (11th Cir. 2003).

[39] *Id.* at 1249.

[40] *West v. Derby Unified School Dist. No. 260*, 206 F.3d 1358, 1366-67 (10th Cir. 2000) (upholding ban on confederate imagery, given past racial tensions and confrontations); *Melton v. Young*, 465 F.2d 1332, 1334-35 (6th Cir. 1972) (same); *see also Sypniewski v. Warren Hills Regional Bd.*

Appendix A

In support of their argument that disciplining Frederick was appropriate, Appellees point to *Boroff v. Van Wert City Board of Education,*[41] a Sixth Circuit case which upheld a high school dress code that was applied to prohibit the wearing of Marilyn Manson T-shirts. The T-shirts contained pro-drug and anti-religious messages and imagery.[42] In *Boroff*, the Sixth Circuit interpreted *Fraser* to grant the school wide-ranging discretion to determine the appropriateness or inappropriateness of certain messages at school. The court concluded that clothing may be banned when it contains "symbols and words that promote values that are[ ] patently contrary to the school's educational mission."[43] We need not pass on whether the clothing ban in *Boroff* could be upheld under our precedent. Nonetheless, to the degree *Boroff* implies that student speech may be prohibited as "plainly offensive" whenever it conflicts with a vaguely-defined "educational mission," we decline to follow it.[44]

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of Educ., 307 F.3d 243, 257 (3rd Cir. 2002) (finding, for the purposes of preliminary injunction, inadequate support for school board's position that T-shirts bearing the term "redneck" posed a "well-founded fear of genuine disruption"); *Castorina ex rel. Rewt v. Madison County Sch. Bd.*, 246 F.3d 536, 544 (6th Cir. 2001) (remanding for factual determination whether there had been racial incidents related to confederate flags).

[41] *Boroff v. Van Wert City Board of Education*, 220 F.3d 465 (6th Cir. 2000).

[42] *Id.* at 469-70.

[43] *Id.* at 470. The school defined its implicated "educational mission" as "to be respectful of others and others' beliefs." *Id.* at 469.

[44] The word "offensive" is not a catch-all to embrace any speech that might offend some hearers. Nor was *Fraser* an invitation to censor and

However, even if we were inclined to adopt *Boroff*, this case is distinguishable in one key respect. *Boroff* sought to wear his T-shirt in the classroom, where its message would be more likely to interfere with the school's core educational mission. Frederick's banner, by comparison, was displayed outside the classroom, across the street from the school, during a non-curricular activity that was only partially supervised by school officials. It most certainly did not interfere with the school's basic educational mission.[45]

We therefore hold that Frederick's punishment for displaying his banner is best reviewed under *Tinker*, rather than *Fraser* or *Kuhlmeier*. *Tinker* requires that, to censor or punish student speech, the school must show a reasonable

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punish any speech that offends school authorities. For example, "scab" is an offensive term, intended to be derogatory, for replacement workers during a strike. Calling replacement teachers "scabs" undermined the school's "mission" to function despite the strike and enable the replacement workers to exercise their authority as teachers and was personally insulting to the replacement teachers. Yet in *McMinnville*, we held that offensiveness in this sense does not take a case from *Tinker* to *Fraser*. By Appellees' standard, distributing photocopies of the Alaska Supreme Court decision in *Ravin v. State*, in which it declared that there is "no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana," 537 P.2d at 511, would also undermine the school's anti-drug mission. However, it could not seriously be contended that handing out copies of *Ravin* on the sidewalk across the street from the school while students were released from classes could be punished. *Fraser* only enables schools to prevent the sort of vulgar, obscene, lewd, or sexual speech that, especially with adolescents, readily promotes disruption and diversion from the *educational curriculum*.

[45] We do not reach the question of whether the school could have prohibited Frederick from displaying his banner on school grounds or wearing a T-shirt that read "Bong Hits 4 Jesus."

concern about the likelihood of substantial disruption to its educational mission. Appellees conceded that the speech in this case was censored only because it conflicted with the school's "mission" of discouraging drug use. That reason fails to meet the bar.

Appellees's conduct violated Frederick's First Amendment rights. Because his speech is protected by the federal constitution, we need not reach the question of whether it is protected by the Alaska Constitution.

We next must address whether, for the purposes of money damages,[46] Appellee Morse is entitled to qualified immunity. The law "provide[s] government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated."[47] The analysis adopted by the Supreme Court in *Saucier v. Katz* requires that we employ a three-part test to determine whether qualified immunity applies.[48] First, we must determine whether the "facts alleged show [Morse's] conduct violated a constitutional right."[49] Second, we must determine whether the right was clearly established at the time of the

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[46] Qualified immunity does not apply to suits for declaratory or injunctive relief. *See Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1472 (9th Cir. 1993).

[47] *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (citations omitted).

[48] *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

[49] *Id.*

alleged violation.[50] Finally, we must determine "whether it would be clear to a reasonable [principal] that [her] conduct was unlawful in the situation [she] confronted."[51]

The first question, whether Morse's conduct violated a constitutional right, has been addressed above in detail and answered in the affirmative. We next must determine whether the violated right was clearly established. This inquiry is a pure question of law.[52] Although for a right to be clearly established "[t]he contours of the right must be sufficiently clear that a reasonable [principal] would understand [that] what [she] is doing violates that right," there is no requirement that we identify a prior identical action.[53] Indeed, even if there were not binding precedent in this case, we would be justified in examining a wide range of relevant legal authority, such as the law of other circuits.[54] As we have already shown, the only times other circuit courts have held that conduct like Morse's is not a constitutional violation, they have done so under facts "distinguishable in a fair way from the facts presented in the case at hand."[55] In this case, however, we need not look so far afield, because there exists clear, well-established law of the Supreme Court and of this circuit that governs the panoply of student speech

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[50] *Id.*

[51] *Id.* at 202.

[52] *See Trevino v. Gates*, 99 F.3d 911, 917 (9th Cir. 1996).

[53] *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

[54] *See Elder v. Holloway*, 510 U.S. 510, 512, 516 (1994).

[55] *Saucier*, 533 U.S. at 202.

cases that might face a school principal: the law of *Tinker*, *Fraser*, *Kuhlmeier*, *Burch*, and *McMinnville*.

As we explicitly discussed in *McMinnville*, and also noted *supra*: vulgar, lewd, and obscene speech is governed by *Fraser*, school-sponsored speech is governed by *Kuhlmeier*, and all other student speech is governed by *Tinker*.[56] Under *Tinker*, students retain First Amendment expression rights at school unless authorities reasonably "forecast substantial disruption of or material interference with school activities," which no one contends in this case.[57] Furthermore, Morse readily admits to being aware of the relevant law, indicating that in her "advanced school law" course she studied "*Tinker*, [*Kuhlmeier*], *Bethel*, *Fraser*, all of the pertinent case law related to student rights or . . . related to schools." The law of which Morse was aware clearly established Frederick's constitutional free speech right. In addition, in *McMinnville* we succinctly explained how to apply the various Supreme Court doctrines of which Morse was aware, thus ensuring that opacity in this particular corner of the law has been all but banished.[58] For purposes of the second prong of the *Saucier* qualified immunity test, Frederick's right was clearly established.

The only remaining inquiry, therefore, requires that we determine whether Morse "could . . . have reasonably but mistakenly believed that [ ] her conduct did not violate a clearly established constitutional right."[59] We conclude that

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[56] *McMinnville*, 978 F.2d at 529.

[57] *Tinker*, 393 U.S. at 514.

[58] *McMinnville*, 978 F.2d at 529.

[59] *Saucier*, 533 U.S. at 205.

she could not have. Once we have held that "the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing [the official's] conduct."[60] And indeed, even lack of knowledge of the basic constitutional rights would not provide a basis for immunity.[61] This is no case of ignorance. The law was clear, and Morse was aware of it. The law of this circuit has provided explicit directives such that officials may determine which Supreme Court standards govern which types of potential student behavior. No novel question is posed on the basis urged by defendants-that "Bong Hits 4 Jesus" promoted a view contrary to government policy-because the armbands in *Tinker* raised the same concerns. The law of *Tinker*, *Fraser*, *Kuhlmeier*, *Burch*, and *McMinnville* is so clear and well-settled that no reasonable government official could have believed the censorship and punishment of Frederick's speech to be lawful.[62] In fact, there is nothing in the authorities that justifies what the school did, and no reasonable official could conclude otherwise. Morse fails the third prong of the *Saucier* test.

Thus, having determined that the "facts alleged show [Morse's] conduct violated a constitutional right," that "the right was clearly established," and that "it would be clear to a reasonable [principal] that [her] conduct was unlawful in the

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[60] *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

[61] *See Wood v. Strickland*, 420 U.S. 308, 321-22 (1975).

[62] *See Vance v. Barrett*, 345 F.3d 1083, 1094 (9th Cir. 2003).

situation [she] confronted," we hold that defendant Morse is not entitled to qualified immunity.[63]

The judgment of the district court is VACATED and the case is REMANDED.

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[63] *Saucier*, 533 U.S. at 201-02.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA DATED AND FILED MAY 27, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

JOSEPH FREDERICK,

Plaintiffs,

vs.

DEBORAH MORSE, and
the JUNEAU SCHOOL BOARD,

Defendants.

No. J 02-008 CV (JWS)

ORDER FROM CHAMBERS

[Re: Motions for Summary Judgment - Dockets 13, 14, 18, and 21]

I. NATURE OF THIS ORDER

This order expresses the court's final decision on the motions at dockets 13 and 14, as to which neither party requested oral argument. This order also expresses the court's tentative views on the motions at dockets 18 and 21 to assist the parties in preparing for oral argument. This order does not authorize the filing of additional papers.

Appendix B

II. MOTIONS PRESENTED

At docket 13, defendants Deborah Morse and the Juneau School Board ("Board" or "JSB") (collectively "defendants") move for partial summary judgment to establish that defendants have qualified immunity from claims under 42 U.S.C. § 1983, that defendants are immune from an award of damages under Alaska law, and that the Board is immune from punitive damages in an action under 42 U.S.C. § 1983. At docket 14, defendants also move for partial summary judgment to establish that the Board is immune from punitive damages under Alaska law. Plaintiff Joseph Frederick opposes both motions. At docket 18, Frederick moves for summary judgment on his claims for declaratory and injunctive relief. Defendants oppose the motion and cross-move for summary judgment at docket 21. Frederick opposes the cross-motion. At docket 24, defendants requested oral argument on the motions at dockets 18 and 21. Oral argument will be heard on these motions on June 10, 2003, at 8:00 a.m.[1]

III. BACKGROUND

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska en route to the winter games in Salt Lake City, Utah. The torch bearers ran through Juneau, down Glacier Avenue, passing in front of Juneau-Douglas High School ("JDHS"). Students at JDHS were permitted to

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[1] Defendants specifically limited their request to the cross-motions. Regardless, the request came too late for the motions at dockets 13 and 14. D.Ak. L.R. 7.2 (requiring that oral argument requests be filed within 3 days after the last paper on the motion).

leave their classes to watch the relay from the sidewalk outside the school. Frederick, who was a senior at JDHS at the time, arrived at school late and immediately joined his friends to watch the event, across the street from JDHS. Just as the relay runner and the TV camera crew passed by Frederick and his friends, they held up a large banner containing the phrase "BONG HITS 4 JESUS."

JDHS principal Morse immediately crossed the street and demanded that Frederick and the others put the banner down. Frederick objected. Morse confiscated the banner and ordered Frederick to report to her office. Frederick did not go straight to her office. Instead, he retrieved his books from his car and reported to his class.[2] When he finally did report to Morse's office, he refused to divulge the names of the other students who participated in holding up the banner. Morse suspended Frederick for 10 days. Frederick claims that Morse increased his suspension from 5 days to 10 after he quoted Thomas Jefferson on freedom of expression.

Frederick appealed his suspension to the Superintendent. The Superintendent concluded that Frederick's behavior - displaying a sign that conflicted with the school's mission, defiant and disruptive behavior, and refusal to respond to a staff directive - warranted suspension, but limited it to the time Frederick had already spent out of school before his suspension was held in abeyance pending the appeal.[3]

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[2] The parties disagree about whether Frederick went to Morse's office on his own or was forced to report. Frederick claims that he informed his teacher and then went to the office, while Morse claims she looked up his schedule and had him removed from class.

[3] Superintendant's Decision (Doc. 13, Ex 2). He had already served 8 days of his suspension before it was held in abeyance pending the Superintendent's decision.

Frederick then appealed the suspension to the Board. On March 19,2002, the board upheld the suspension.[4] On April 25, 2002, Frederick filed the instant lawsuit against Morse and the Board in U.S. District Court.[5] His complaint seeks declaratory and injunctive relief, unspecified compensatory damages, and punitive damages for violations of his federal and state constitutional rights to free speech.

IV. STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine dispute as to material fact.[6] The moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact.[7] Once the moving party has met this burden, the nonmoving party must set forth evidence of specific facts showing the existence of a genuine issue for trial.[8]

All evidence presented by the non-movant must be believed for purposes of summary judgment, and all

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[4] Minutes of Board Meeting (Doc. 13, Ex. 3).

[5] Doc . 1

[6] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

[7] *Id.* at 323-325.

[8] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

justifiable inferences must be drawn in favor of the non-movant.[9] However, the nonmoving party may not rest upon mere allegations or denials, but must show that there is sufficient evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial.[10]

V. DISCUSSION

A. Qualified Immunity

1. Defendants' Immunity From Damages Under 42 U.S.C. § 1983

Defendants argue that they are immune from suits for damages brought pursuant to 42 U.S.C. § 1983. Government officials performing discretionary functions are entitled to qualified immunity and "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[11] Plaintiff has the burden of overcoming a defendant's claim of qualified immunity by showing that the official violated a clearly established right.[12] A right is clearly established when it would be clear to a reasonable official that the conduct was unlawful under the circumstances, either because there is

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[9] *Id.* At 255.

[10] *Id.* at 248-49.

[11] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

[12] *See Conn v. Gabbert*, 526 U.S. 286, 290 (1999). Frederick incorrectly places the burden on defendants.

published case law on point or because the official's actions are so "far fetched" that the illegality is obvious.[13]

Frederick argues that his First Amendment rights are clearly established and that Morse is not entitled to qualified immunity. However, he relies only on the fact that First Amendment law is clearly established. This is not enough. Frederick points to no case law on point showing definitively that Morse could not silence or punish him for what he did. Frederick argues that *Tinker v. Des Moines Independent Community School District*[14] shows that his constitutional rights were clearly established. There, the Supreme Court found that the school's ban on wearing of armbands to protest the Vietnam conflict was a violation of the students' first amendment rights. On the contrary, the more recent decision in *Bethel School District No. 403 v. Fraser*[15] shows that it was objectively reasonable for defendants to believe that their actions were proper.

Morse reasonably believed that she could and should suppress speech that encourages drug use among students in light of the decision in *Fraser* and the Board's policies prohibiting such language. In *Fraser*, the Supreme Court upheld a student's suspension for giving a speech in a school-sponsored assembly that contained what administrators found to be lewd and indecent language. The

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[13] *See Saucier v. Katz*, 533 U.S. 194, 202 (2001); *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986) (applying standard of reasonable objectiveness); *see also Trevino v. Gates*, 99 F.3d 911, 917 (9th Cir. 1996); *Chew v. Gates*, 27 F.3d 1432, 1450 (9th Cir. 1994).

[14] 393 U.S. 503 (1969).

[15] 478 U.S. 675 (1986).

court in *Fraser* explained that the First Amendment does not prevent school officials from determining that certain language "would undermine the school's basic educational mission."[16] In fact, the court emphasized that it is a "highly appropriate function of public education to prohibit the use of . . . offensive terms in public discourse."[17] Here, Board policies prohibit offensive language, including statements advocating drug use.[18] Moreover, it was reasonable for defendants to believe *Fraser* governed the situation here and not *Tinker* because the expression in *Tinker* did not intrude upon the work of the schools.[19] Here, by contrast, Frederick's expression directly conflicted with the school's deterrence of illegal drug use.

None of Frederick's arguments change this result. The cases he cites either pre-date *Fraser* or are distinguishable, or both.[20] Further, even if the event was not a school-sponsored activity, defendants still did not violate clearly established law if Morse reasonably believed that the statement was

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[16] *Id.* at 685.

[17] *Id.* at 683.

[18] Board Policy No. 5520 (Doc. 21, Att. B, Att. 3, at 1).

[19] *Fraser*, 478 U.S. at 680

[20] *See, e.g., Hatter v. Los Angeles City High Sch. Dist.*, 452 F.2d 673 (9th Cir. 1971) (involving peaceful political expression); *Saunders v. Virginia Polytechnic Inst.*, 417 F.2d 1127, 1130 (4th Cir. 1969) (out-of-circuit pre-*Fraser* case). The remainder involve principles that are not applicable here. *See, e.g., Brandenberg v. Ohio*, 395 US. 444 (1969) (clear and present danger test); *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 450 U.S. 37, 45-46 (1983) (public forum); *Hopper v. Pasco*, 241 F.3d 1067, 1074-75 (9th Cir. 2001) (restrictions in limited public forums).

directed at students on campus.[21] Frederick does not argue that defendants' actions were so far-fetched as to make the illegality apparent. Thus, defendants are immune from civil liability for damages stemming from any alleged violation of Frederick's constitutional rights.

b. Immunity Under Alaska law

Defendants also argue that they are immune from an award of damages under Alaska law. In support of this argument, defendants rely on two separate statutory provisions: AS 14.33.140 and AS 09.65.170. AS 14.33.140 provides that:

> [a] teacher, teacher's assistant, a principal, or another person responsible for students is not liable for civil damages resulting from an act or omission (1) arising out of enforcement of an approved school disciplinary and safety program . . . and (2) arising out of and in the course of employment unless the act or omission constitutes gross negligence or reckless or intentional misconduct.

The plain language of this statute provides immunity to both Morse and JSB. Contrary to Frederick's argument, nothing

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[21] *Baker v. Downey City Bd. of Ed.*, 307 F. Supp. 517, 526 (C.D. Cal. 1969) (finding school's ban on distribution of underground newspaper outside school gate of campus did not violate students' First Amendment rights because students were entering campus and "school authorities are responsible for the morals of the students while going to and from school, as well as during the time they are on campus). It is undisputed that the sign was visible from the campus. Declaration of Deborah Morse (Doc. 21, Att. B), ¶ 3 ("Morse Decl.") (explaining that the sign was in "full view and easily readable by students on the high school side of the street").

indicates that it is intended only to protect those with direct responsibility for student discipline and safety. Thus, JSB is also protected by this statute.

Frederick makes a variety of arguments against application of this statute, none of which are convincing. For example, Frederick argues that there is no evidence Morse was acting pursuant to an approved disciplinary plan. However, he presents no evidence demonstrating that there is a factual issue in this regard. Defendants, on the other hand, present admissible evidence that the Board's discipline and safety policies, which were adopted prior to AS 14.33.120, satisfy the statute's requirements[22] and the Superintendent's decision demonstrates that Morse was relying on that plan.[23] Frederick also argues that the evidence thus far could produce a finding of gross negligence or recklessness. However, Frederick never alleged gross negligence or recklessness and fails to offer any specific discussion of facts demonstrating that Morse or JSB acted with gross negligence or recklessness. Accordingly, defendants are both immune from civil liability under Alaska law.[24]

2. Board's Immunity from Punitive Damages

Finally, defendants move for summary judgment on the issue of JSB's immunity from punitive damages as a municipal entity under both federal and state law. Frederick does not dispute that JSB is immune if found to be a unit of

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[22] Morse Decl., ¶ 6

[23] Doc. 13, Ex. 2 (reciting infractions).

[24] Because the court finds defendants are immune under AS 14.33.140, the court will not consider whether the Board is immune under AS 09.65.170.

local government. In fact, he explains that he has no intent of seeking punitive damages against the Board as a government entity. Frederick suggests instead that he may pursue punitive damages against the individual members of the board. However, defendants correctly point out that Frederick did not name the board members in their individual capacity in his suit. Accordingly, this statement is of no consequence.

B. Summary Judgment on Claims for Declaratory and Injunctive Relief

The remaining claims in Frederick's complaint are his claims for declaratory and injunctive relief. Frederick moves for summary judgment on these claims and defendants oppose his motion and cross-move for summary judgment.

1. Whether Frederick's Speech is Protected

Defendants argue that Frederick's rights cannot have been violated because his banner was not protected in the first place. Defendants rely upon Supreme Court decisions concerning conduct and argue that Frederick's conduct in holding up the sign was not protected under the First Amendment because he had no intent to convey a particularized message that was likely to be understood by those who viewed it.[25] Indeed, defendants point to statements by Frederick that the phrase "Bong Hits 4 Jesus"

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[25] Doc. 21 , at 11 (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *Spence v. State of Washington*, 418 U.S. 405, 410-11 (1974)).

has no meaning."[26] Nevertheless, those very same documents demonstrate that Frederick had some sort of communicative intent.[27] Accordingly, the fact that Frederick chose an allegedly nonsensical phrase does not mean that his speech is not protected.[28]

2. Suppression of Frederick's Speech under Federal Law

The critical issue, therefore, is whether the school officials were entitled to suppress Frederick's speech and punish him. Frederick argues that under existing Supreme Court precedent, defendants had no right to seize the banner and suspend him. Defendants, on the other hand, argue that existing Supreme Court precedent does permit them to exercise such power over Frederick and that their actions do not violate Frederick's constitutional rights.

a. Exhibition of the Sign

Both parties agree that a central issue is whether the parade-viewing constituted a school-sponsored activity. For

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[26] *E.g.* Deposition of Joseph Frederick (Doc. 21, Ex. K), at 124 ("Frederick Dep."). All page numbers refer to deposition page numbering.

[27] Affidavit of Joseph Frederick (Doc. 18, Ex. A), ¶ 3 (Frederick Aff.") (describing it as a humorous parody and an exhibition of free speech rights); Frederick Dep. at 58 (explaining that he wanted to be controversial), and 60-61 (describing it as an assertion of his first amendment rights).

[28] *See Hurley, et al. v. Irish-American Gay, Lesbian, Bisexual Group*, 515 U.S. 557 (1995). This is not to say, however, that Frederick is correct when he argues that the mere fact he used words means it is "speech" entitled to protection. It is the fact that he was trying to communicate something that makes his conduct expressive.

if it did, there is little doubt that the school has wider discretion to control Frederick's actions. Frederick is undoubtedly correct that students are not without First Amendment rights simply because they enter the school environment. Nevertheless, it is equally clear that the rights of students are not "automatically coextensive with the rights of adults in other settings."[29]

Contrary to Frederick's claim, there is no issue of fact as to whether or not this was a school-sponsored activity. Defendants present admissible evidence that viewing the torch relay was a school-sponsored activity. Morse explains that, believing the event had educational value and significance to the community, she authorized the teachers to take their classes to view the relay.[30] Further, she states that the band and cheerleaders were organized to greet the relay participants, and teachers and administrative officials monitored students' actions.[31] These facts are all indicative of the school-sponsored nature of the activity. In response, Frederick presents affidavits from his classmates stating only that they were not required to stay with their class, and that the entire scene was "chaos."[32] However, these facts do not create an issue of fact because they are not directly contrary to any of defendants' evidence showing that it was school-sponsored. That it constituted a school-sponsored

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[29] *Fraser*, 478 U.S. at 682.

[30] Morse Decl., ¶ 9.

[31] Morse Decl. ¶¶ 9a-b, d-e, 10.

[32] Affidavit of Michael Croteau (Doc. 18, Ex. C); Affidavit of Sara Croteau (Doc. 18, Ex. D); Affidavit of Melinda Madsen (Doc. 18, Ex. E).

activity is further supported by common sense. The relay occurred during school hours, at a time when parents expected their children to be under school supervision.

Frederick argues that, even if it was school sponsored, the fact that he was not in school earlier means he was not a participant in the school-sponsored function. Indeed, the parties agree that Frederick was not in school prior to the event. However, the fact that Frederick joined his fellow classmates at the school-sponsored event meant that he was attending a school-sponsored activity.[33] This is particularly so since Frederick's own statements suggest that he would have been at school prior to the event had his car not gotten stuck in the snow.[34] Thus, Frederick's presence at the event put him under the school's authority.

The fact that Frederick was participating in a school-approved event is significant in dictating the degree to which the school could control the content of his speech or his expressive conduct. The school's authority to control Frederick's exhibition of the sign is established by *Fraser*. Frederick's expression is not like that in *Tinker*. Frederick clearly chose a specific event at which to exhibit his sign, just as *Fraser* chose a specific forum in which to make his speech. But more important, this is not a case like *Tinker* where students chose to make a statement of personal opinion that was unrelated to the school's mission.[35] To the

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[33] It is also shown that Morse did not know that he was not at school prior to the event.

[34] Frederick Aff. ¶ 5.

[35] It appears that even under *Tinker*, the fact that Frederick's sign could be interpreted to advocate illegal drug use justifies the defendants' actions. *See Tinker*, 393 U. S. at 508 (explaining that punishment was not

contrary, Fredericks statements directly contravened the Board's policies relating to drug abuse prevention.

Frederick is incorrect that *Fraser* applies only to lewd and obscene language. In fact, the principle announced in *Fraser* extends further. The court in *Fraser* stated that it is the province of the Board to "determine what manner of speech . . . is inappropriate."[36] The court recognized that certain forms of speech such as, in that case, lewd and obscene speech, might undermine the school's basic educational mission and, therefore, as instruments of the state, they may determine that certain speech does not teach students the boundaries of appropriate social behavior.[37] Finally, later cases have recognized the breadth of *Fraser*.[38] JSB has determined that messages advocating illegal drug use undermine its own mission. The Board has established a variety of policies, including a prohibition on messages

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proper because there was "no evidence of [] interference, actual or nascent, with the school's work"). Without a doubt, part of the school's work is to deter drug and alcohol abuse. Thus, other cases have found that t-shirts expressing inappropriate messages, conflicting with the mission of the school, could be censored without violating the First Amendment. *See, e.g., Boroff v. Van Wert City Bd. of Ed.*, 220 F. 3d 465, 470 (6th Cir. 2000) (concluding school could prohibit t-shirt depicting Marilyn Manson because of the connection with drug-using lifestyle).

[36] 478 U.S. at 683.

[37] *Id.*

[38] *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) (stating that it applies to "plainly offensive" speech); *see Boroff*, 220 F.3d at 469.

advocating illegal drug use.[39] Having determined that speech advocating illegal drug use is inappropriate in the school, Morse had the authority, if not the obligation, to stop such messages at a school-sanctioned activity so as not to place the imprimatur of school approval on the message.[40]

Frederick goes on to argue that, because his message does not clearly advocate illegal drug use, summary judgment is not appropriate. In support, Frederick presents statements from his friends and classmates who assert that they did not understand the message to advocate drug use.[41] Further, Frederick himself claims that he did not intend to communicate any such message.[42] Although this evidence is admissible, these facts are beside the point. There is no requirement that the speaker intend the message as one that violates school policy or that all the students understand it in that fashion. Rather, the determination of an administrator that a particular statement is in violation of school policy is generally not scrutinized so long as the administrator's interpretation is reasonable.[43] The court did not undertake

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[39] Board Policies 1422 (health education), 5511 (dress and grooming), 5520 (disruption an demonstration), and 5530 (chemical use) (attached at doc. 21, Att. B, Atts 1-7)

[40] *See McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918, 924 (E.D. Mo. 1999).

[41] Doc. 22, Ex. C, ¶ 1; Doc. 22, Ex. D, ¶ 6.

[42] Frederick Aff., ¶ 3.

[43] *Fraser*, 478 U.S. 675 (never considering speaker's intent or students' understanding); *see also, e.g., Pyle by and through Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157, 170 (D. Mass. 1994) (refusing to second-guess administrator's determination that speech was lewd).

such scrutiny in *Fraser*, where the student's speech was arguably ambiguous.[44] Morse made a determination that the sign advocated drug use. The fact that Frederick admitted that the terms he used, including "bong" and "hit," could be understood to refer to drugs shows that defendants' understanding was reasonable.[45] This case is no different from many others in which the courts have deferred to administrators' judgments.[46]

b. Quotation of Jefferson

Frederick also moves for summary judgment that Morse improperly increased his suspension from 5 to 10 days. In his affidavit, Frederick claims that, upon being told by Morse that he was suspended for 5 days, he quoted Jefferson and that, thereafter, Morse increased his suspension to 10 days for being defiant.[47] Defendants are correct, however, that Frederick fails to establish that he was suspended for 10 days, rather than 5, because of his quotation because his affidavit contradicts his own testimony given at the hearing before the Board held on March 13, 2002. At that hearing, he testified that, after he refused to name everyone involved in holding the sign, Morse "immediately said I would be suspended for even longer for interfering with an

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[44] *Fraser*, 478 U.S. at 687-88 (noting that language was not clearly obscene but nevertheless conceding that the school has the discretion to determine what exceeds permissible limits) (Blackmun, J., dissenting)

[45] Frederick Dep., at 18-19, 70-71.

[46] *See e.g., McCann*, 50 F. Supp.2d at 920, 924 (permitting band from playing "White Rabbit" because that could be perceived to advocate illegal drug use); *Boroff*, 220 F.3d at 469.

[47] Frederick Aff. (Doc. 18, Ex. A), ¶ 10

investigation."[48] He cannot now try to show the facts are established by his declaration.[49] Accordingly, insofar as Frederick seeks summary judgment on this issue, his motion probably should be denied.[50]

3. Suppression of Frederick's Speech under Alaska Law

Count 2 of Frederick's complaint alleges that defendants violated his rights under the Alaska Constitution. Frederick argues that the "compelling needs" test guides the analysis of whether his rights under the Alaska Constitution have been violated. However, he does not meet this burden of demonstrating that the school did not meet the standard because he presents no analysis or supporting evidence that the defendants have failed to meet this test. Accordingly, this branch of Frederick's motion probably should be denied. Defendants' cross motion does not address this claim.

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[48] Transcript (Doc. 21, Ex. I),at 60-61.

[49] *Giovanni v. Sea-Land Serv.*, Inc., __ F. Supp__ , 1997 WL 227897 *6 (N.D. Cal. April 28, 1997), *aff'd* 145 F.3d 1337 (9th Cir. 1998) (disregarding declaration insofar as it contradicted own deposition testimony); *Rodabenko v. Automated Equip. Co.*, 520 F.2d 540, 544 (9th Cir. 1985) (cannot create an issue of fact by contradiction).

[50] Although defendants argue that this factual issue is immaterial, they fail to fully explain why they believe this to be the case. Indeed, this fact is unrelated to whether or not Frederick could be punished for holding up the sign at the parade. However, it is not entirely clear that it could not constitute a separate basis upon which to find his first amendment rights had been violated.

Appendix B

VI. CONCLUSION

For the reasons stated above, defendants' motions for summary judgment at dockets 13 and 14 are GRANTED. Frederick's motion for summary judgment at docket 18 probably should be DENIED and defendants' cross-motion for summary judgment at docket 21 probably should be DENIED in part and GRANTED in part.

DATED at Anchorage, Alaska this 27 day of May, 2003

s/ John W. Sedwick

JOHN W. SEDWICK

UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA DATED AND FILED ON MAY 29, 2003

MINUTES OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JOSEPH FREDERICK v. DEBORAH MORSE, et al.

THE HONORABLE JOHN W. SEDWICK
CASE NO. J02-0008 CV (JWS)

Deputy Clerk: Pam Richter
Official Recorder: _____

APPEARANCES: for PLAINTIFF: ----
for DEFENDANT: ----

PROCEEDINGS: **ORDER FROM CHAMBERS**

The court issued a preliminary order at docket 29 indicating its tentative view that the plaintiff's motion for summary judgment at docket 18 should be denied and that defendants' motion for summary judgment at docket 21 should be granted. The order was issued to allow the parties to better prepare for oral argument. However, the parties filed a stipulation withdrawing the request for oral argument. The court approved that stipulation in a recent order.

Having carefully considered its preliminary order at docket 29 in light of the parties' briefing, the court concludes that the preliminary order is in all respects correct. Accordingly, for the reasons given in the order at docket 29,

plaintiff's motion for summary judgment at docket 18 is DENIED, and defendants' motion for summary judgment at docket 21 is GRANTED.

The Clerk will please enter judgment that plaintiff take nothing from defendants and that defendants recover their costs from plaintiff.

ENTERED AT JUDGE'S DIRECTION

INITIALS: prr

Deputy Clerk

DATE: May 29, 2003

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA DATED MAY 29, 2003 AND FILED ON MAY 30, 2003

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

JOSEPH FREDERICK,

Plaintiff,

v.

DEBORAH MORSE, et al.,

Defendants.

Case Number J02-0008 CV (JWS)

JUDGMENT IN A CIVIL CASE

___ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **DECISION BY COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

Appendix D

THAT plaintiff take nothing from defendants and that defendants recover their costs in the amount of $_____ from plaintiff.

APPROVED:

s/ John W. Sedwick

John W. Sedwick

United States District Judge

Date: 5-29-03

Michael D. Hall

Clerk

s/ Patricia Demeter

(By) Deputy Clerk

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED ON APRIL 18, 2006

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH FREDERICK,

Plaintiff-Appellant.

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,

Defendants - Appellees.

No. 03-35701

D.C. No. CV-02-00008-J-JWS
District of Alaska, Juneau

ORDER

Before: HALL, KLEINFELD, and WARDLAW, *Circuit Judges.*

The panel has voted unanimously to deny the petition for rehearing. Judges Kleinfeld and Wardlaw have voted to deny the petition for rehearing en banc, and Judge Hall has recommended the same.

Appendix E

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX F — SELECTED PROVISIONS OF THE SAFE AND DRUG-FREE SCHOOLS AND COMMUNITIES ACT, 20 U.S.C. § 7101 *et seq.*

§ 7102. Purpose

The purpose of this part is to support programs that prevent violence in and around schools; that prevent the illegal use of alcohol, tobacco, and drugs; that involve parents and communities; and that are coordinated with related Federal, State, school, and community efforts and resources to foster a safe and drug-free learning environment that supports student academic achievement, through the provision of Federal assistance to —

(1) States for grants to local educational agencies and consortia of such agencies to establish, operate, and improve local programs of school drug and violence prevention and early intervention;

(2) States for grants to, and contracts with, community-based organizations and public and private entities for programs of drug and violence prevention and early intervention, including community-wide drug and violence prevention planning and organizing activities;

(3) States for development, training, technical assistance, and coordination activities; and

(4) public and private entities to provide technical assistance; conduct training, demonstrations, and evaluation; and to provide supplementary services and community-wide drug and violence prevention planning and organizing activities for the prevention of drug use and violence among students and youth.

* * *

Appendix F

§ 7114. Local educational agency program

* * *

(d) Contents of applications

An application submitted by a local educational agency under this section shall contain —

(1) an assurance that the activities or programs to be funded comply with the principles of effectiveness described in section 7115(a) of this title and foster a safe and drug-free learning environment that supports academic achievement;

(2) a detailed explanation of the local educational agency's comprehensive plan for drug and violence prevention, including a description of —

(A) how the plan will be coordinated with programs under this chapter, and other Federal, State, and local programs for drug and violence prevention, in accordance with section 7846 of this title;

(B) the local educational agency's performance measures for drug and violence prevention programs and activities, that shall consist of —

(i) performance indicators for drug and violence prevention programs and activities; including —

(I) specific reductions in the prevalence of identified risk factors; and

(II) specific increases in the prevalence of protective factors, buffers, or assets if any have been identified; and

(ii) levels of performance for each performance indicator;

(C) how such agency will assess and publicly report progress toward attaining its performance measures;

(D) the drug and violence prevention activity or program to be funded, including how the activity or program will meet the principles of effectiveness described in section 7115(a) of this title, and the means of evaluating such activity or program; and

(E) how the services will be targeted to schools and students with the greatest need;

(3) a description for how the results of the evaluations of the effectiveness of the program will be used to refine, improve, and strengthen the program;

(4) an assurance that funds under this subpart will be used to increase the level of State, local, and other non-Federal funds that would, in the absence of funds under this subpart, be made available for programs and activities authorized under this subpart, and in no case supplant such State, local, and other non-Federal funds;

(5) a description of the mechanisms used to provide effective notice to the community of an intention to submit an application under this subpart;

(6) an assurance that drug and violence prevention programs supported under this subpart convey a clear and consistent message that acts of violence and the illegal use of drugs are wrong and harmful;

(7) an assurance that the applicant has, or the schools to be served have, a plan for keeping schools safe and drug-free that includes —

(A) appropriate and effective school discipline policies that prohibit disorderly conduct, the illegal possession of weapons, and the illegal use, possession,

distribution, and sale of tobacco, alcohol, and other drugs by students;

(B) security procedures at school and while students are on the way to and from school;

(C) prevention activities that are designed to create and maintain safe, disciplined, and drug-free environments;

(D) a crisis management plan for responding to violent or traumatic incidents on school grounds; and

(E) a code of conduct policy for all students that clearly states the responsibilities of students, teachers, and administrators in maintaining a classroom environment that —

(i) allows a teacher to communicate effectively with all students in the class;

(ii) allows all students in the class to learn;

(iii) has consequences that are fair, and developmentally appropriate;

(iv) considers the student and the circumstances of the situation; and

(v) is enforced accordingly;

(8) an assurance that the application and any waiver request under section 7115(a)(3) of this title will be available for public review after submission of the application; and

(9) such other assurances, goals, and objectives identified through scientifically based research that the State may reasonably require in accordance with the purpose of this part.

* * *

Appendix F

§ 7162. Message and materials

(a) "Wrong and harmful" message

Drug and violence prevention programs supported under this part shall convey a clear and consistent message that the illegal use of drugs and acts of violence are wrong and harmful.

* * *

APPENDIX G — SELECTED POLICIES OF THE BOARD OF EDUCATION, JUNEAU SCHOOL DISTRICT, REGARDING STUDENT CONDUCT

BOARD POLICY NO. 5511

DRESS AND GROOMING

The Board of Education recognizes that each student's mode of dress and grooming is a manifestation of the student's personal style and individual preferences. The Board will impose its judgement on students and parents only when a student's dress and grooming affect the educational program of the schools.

Students may not wear clothing or engage in grooming practices that present a health or safety hazard to the individual student or to others; materially interfere with school work, create disorder, or disrupt the educational program; cause excessive wear or damage to school property; or prevent the student from achieving his or her own educational objectives because of blocked vision or restricted movement. Clothing that is sexually provocative or that advertises or advocates the use of illegal drugs, alcohol or tobacco is prohibited as inconsistent with the district's educational mission and disruptive to the district's educational program. Clothing that contains or constitutes speech that would be prohibited under the standards established in Board Policy 5721 for non-school sponsored student publications is also prohibited. The building principals for each level of school shall determine as a group whether the dress or grooming of students comes within these prohibitions.

4 A.A.C.07.010

Adopted 1/8/85

Appendix G

Revised 2/20/96
Revised 5/15/01

* * *

BOARD POLICY NO. 5520

DISRUPTION AND DEMONSTRATION

The Board of Education is responsible for providing a program of education for students in this district and is authorized to preserve order so that the system may function properly. Students will not be disturbed in the exercise of their constitutionally guaranteed rights to assemble peaceably and to express ideas and opinions, privately or publicly, provided that their activities do not infringe on the rights of others and do not interfere with the operation of the educational program.

The Board will not permit the conduct on school premises of any willful activity engaged in by an individual acting alone or by a group of individuals that interferes with the orderly operation of the educational program or offends the rights of others. The Board specifically prohibits any assembly or public expression that materially disrupts instruction; is obscene, slanderous, or grossly prejudicial to an ethnic, national, religious, or racial group or to either gender; advocates the use of substances that are illegal to minors; incites violence or urges the violation of law or school rules. Disorderly students will be disciplined in accordance with law and Board policy; staff members who assist students in disorderly conduct may be subject to disciplinary measures.

Appendix G

The Board directs all staff members to attempt to resolve student conflict and dissent by reason and arbitration. Students should be made aware of the lawful procedures available to them for the resolution of their grievances.

The Superintendent shall establish procedures for the prompt resolution of any disruption that occurs on school premises. The building principal shall be responsible for the identification and resolution of disruptions in any school building; he or she may summon law enforcement officers as deemed necessary.

4 A.A.C.07.010

Adopted 1/8/85

Revised 3/1/88

Revised 2/17/98

* * *

BOARD POLICY NO. 5721

DISTRIBUTION OF NON-SCHOOL SPONSORED PUBLICATIONS

The Board of Education respects student rights and encourages students to exercise their right to express themselves in print and in the electronic media and to publish and distribute such materials as part of that expression; at the same time, the Board recognizes that the exercise of that right must be limited by the rights of other members of the school community, and may not substantially interfere with the educational process.

Appendix G

General Provisions and Definitions

Permission to distribute published material does not imply approval of its contents by either the school board or District administrators.

For the purposes of this policy, "published materials" include any written or printed cards, letters, circulars, books, pamphlets, notices, newspapers, and similar materials, in addition to materials that are distributed through the electronic media, including computer, video, or audio presentations.

Distribution of published material in the schools may occur only at the places and during the times established by school rule, in order not to disrupt the orderly operation of the education program. Further, any such material must contain the full and true name of its author(s).

"Distribution" means circulation or dissemination of published material by means of handing out free copies, selling or offering copies for sale and accepting donations for copies. Further, "distribution" includes displaying such material in areas of the school that are generally frequented by students.

In order for published material to be considered disruptive, there must exist specific facts upon which the likelihood of disruption may be determined, including past experience in the school, current events influencing student activities and behavior, or instances of actual or threatened disruption of school operations, relating to the material in question.

Prohibited Materials

The distribution on school premises of the following types of materials is prohibited: materials that;

(a) are seriously prejudicial to any person, any ethnic, national, religious, or racial group, to either gender, or to any person or persons based on sexual orientation;

(b) threaten violence against an individual or group;

(c) invade another person's privacy;

(d) encourage actions which endanger the health or safety of another person;

(e) libel, in the absence of privilege, any person or persons;

(f) advocate the use by minors of any illegal substance or material;

(g) constitute obscenity or contain pervasively vulgar or lewd material deemed to be harmful to impressionable students;

(h) incite violence;

(i) urge the violation of law or school regulations; or,

(j) present a clear and present likelihood that, because of their content or manner of distribution, they will cause a material and substantial disruption of the operation of the school, school activities, or the educational process.

For the distribution of materials described in categories (i) and (j) to be considered a violation of this policy, the distribution must be to a substantial number of students. A "substantial number" of students is defined as ten or more students.

Prior Review of Published Materials

No published materials may be distributed on elementary or middle school premises that have not been submitted to the building principal for review in advance of their distribution. Where the building principal has received the

materials for review and cannot offer reasons, within three school days, why their distribution should be prohibited, the materials may be distributed.

The building principal must offer students an opportunity to remove or modify materials that he or she finds prohibited in accordance with this policy. Any such modified printed material must be resubmitted to the building principal for his or her review. Appeal from the determination of the building principal may be made in accordance with Board policy on student grievance (Policy #5710).

Regulations and Penalties

The superintendent must develop and enforce regulations that govern the time, place and manner of distribution or circulation of published materials on school grounds.

Failure to comply with the requirements of this policy, or administrative regulations promulgated under this policy, will result in confiscation of the offending materials and, as appropriate, disciplinary action against the student(s) who have violated its terms.

4 A.A.C.07.010

Adopted 1/8/85

Revised 3/1/88

Revised 1/19/93

Revised 11/17/98

* * *

Appendix G

BOARD POLICY NO. 5850

SOCIAL EVENTS AND CLASS TRIPS

The Board of Education recognizes the value of social events and class trips that will enhance and enrich the school experience for the students of this district.

The Board will make school facilities available and assign staff members as appropriate for the conduct of social events on school premises and for social events and class trips away from school premises that have been approved by the school administrator.

Pupils who participate in approved social events and class trips are subject to district rules for student conduct; infractions of those rules will be subject to discipline in the same manner as are infractions of rules during the regular school program. Participation in approved social events or class trips is not a right and may be denied to any student who has demonstrated disregard for the school rules.

The Superintendent will develop regulations governing the conduct and safety of all participants in social events and class trips and will distribute them to student and adult participants.

Adopted 1/8/85

APPENDIX H — SUPERINTENDENT'S DECISION ON APPEAL DATED FEBRUARY 25, 2002

TO: Joseph Frederick

From: Gary Bader s/ GMB

Re: Appeal of Suspension

Date: February 25, 2002

Below is my response to your appeal of your suspension. Pursuant to Board Policies 5610 and 5710, copies of which are attached to this decision, you may appeal my decision to the Juneau School District Board of Education by submitting a written appeal to my office, addressed to the school board, within five calendar days of the date you receive this decision.

IN THE MATTER OF THE SUSPENSION OF JOSEPH FREDERICK FROM JUNEAU-DOUGLAS HIGH SCHOOL

Joseph Frederick, a student at Juneau-Douglas High School, was suspended from school for a period of ten days. He was forbidden to come on campus or to participate in school activities during that time, but was permitted to make up missed assignments. According to school records, Joseph was suspended for the following infractions: 2.05 Defiant/Disruptive Behavior, 2.07 Refusal to respond to staff directive regarding behavior, 2.08 Refusal to cooperate/assist in investigation, 2.12 Display of Offensive Material, and 2.17 Truancy/Skipping.

2.12 Display of Offensive Material

Joseph and others were holding a banner bearing the phrase "Bong hits 4 Jesus" on the sidewalk across the street from Juneau-Douglas High School while the Olympic Torch relay passed by. Joseph contends his display of a banner is

protected speech under the First Amendment. He asserts "a students' right to free speech may be abridged only by a showing by the school administration of a compelling need to curtail those rights, based on a credible threat by the student's exercise of free speech to the educational process or public safety." He further asserts that "a school's legal ability to abridge a student's free speech rights is limited to school property and school activities; it does not extend to speech in a public place outside of the classroom." I agree that students do not shed their constitutional rights at the schoolhouse gate. I do not agree, however, that Joseph's description of the applicable legal standard in this situation is correct. The Supreme Court has also said that "the First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings' . . . and must be 'applied in light of the special characteristics of the school environment.'" (Justice White's decision in *Hazelwood v. Kuhlmeier*, quoting in part from *Tinker v. Des Moines* and *Bethel v. Fraser*).

Bethel v. Fraser was a case in which the U.S. Supreme Court upheld the right of a school district to discipline a student for making a sexually suggestive speech in a voluntary school assembly. There the Court noted the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [the student's] speech in this case" and stated that the Court in *Tinker* had been careful to note that the case before it there "did 'not concern speech or action that intrudes upon the work of the schools or the rights of other students.'"

In *Bethel* the Court acknowledged that one of the missions of public education is to "inculcate the habits and manners of civility as values" in students. Those values, the Court said, "include tolerance of divergent political and religious views, even when the views expressed may be

unpopular," but they "must also take into account the sensibilities of others" including fellow students. Moreover, the freedom to express unpopular views must be "balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Bethel* teaches that the First Amendment does not require school districts to tolerate student speech that "would undermine the school's basic educational mission."

Joseph's "speech" was to display a banner with the phrase "Bong hits for Jesus." Joseph stated the banner was his. He stated his intended audience was the television camera across the street from where he was displaying his banner. When asked what the phrase meant, Joseph gave inconsistent answers. He told Principal Morse that the phrase was an acronym for "Better Olympic National Games – Head into Town 4 Jesus." When I asked Joseph what the phrase meant, he repeatedly evaded a direct answer. He said the phrase could mean many things. In response to questioning from his attorney, Joseph stated that the phrase was not intended to advocate drug usage or to promote the Christian religion. In his written appeal, Joseph describes the phrase as a common one found on snowboards and snowboard-related materials and asserts that it "may evoke advocacy of legalized marijuana or advocacy of the Christian religion" but that the "precise intent of the phrase does not matter." It does matter, however. Contrary to his assertion, Joseph was not disciplined because the principal of the school "disagreed" with his message, but because his speech appeared to advocate the use of illegal drugs.

The common-sense understanding of the phrase "bong hits" is that it is a reference to a means of smoking marijuana. Given Joseph's inability or unwillingness to express any other credible meaning for the phrase, I can only agree with the principal and countless others who saw the

banner as advocating the use of illegal drugs. Joseph's speech was not political. He was not advocating the legalization of marijuana or promoting a religious belief. He was displaying a fairly silly message promoting illegal drug usage in the midst of a school activity, for the benefit of television cameras covering the Torch Relay. Joseph's speech was potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use.

The Juneau School District has a long-standing policy prohibiting the use of illegal drugs. Speech promoting illegal drug use is specifically prohibited by several board policies. The district teaches abstinence from drug usage as part of its curriculum. The school board has included the promotion of healthy attitudes and behaviors as one of the four strategies of the district's strategic plan. Federal funding for the district is dependent upon the district's pursuit of a drug free environment. The high school offers space to programs that treat young people for substance abuse.

In *Bethel v. Fraser* the Court stated that "Justice Black, dissenting in Tinker made a point that is especially relevant in this case":

> I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.

The principal's act of removing the banner is permissible under the Constitution because Joseph's speech was "speech or action that intrudes upon the work of the schools."

Joseph contends that the school's legal ability to abridge a student's free speech rights is limited to school property

and school activities, and asserts that he was not participating in a school activity. I find that assertion to be incorrect.

Joseph was participating in a school activity attended predominantly by Juneau Douglas High School (JDHS) students. He was standing on or near a public sidewalk across the street from the high school in the midst of students who had been excused from class to watch other students and community members carry the torch in the Olympic Games Torch Relay. The school district expended funds so that other students attending schools that were not on the torch route could bus their students to another location to see the event. The high school band was performing while students waited for the torch to arrive. High school teachers were authorized to allow their students to attend the Torch Relay as a class, provided the students were supervised at all times. The directive from the principal's office was that students were to stay on the sidewalks and out of the street. Students were not restricted to school property to witness the event.

School is generally considered to be the premises where instruction is taking place. However, it is not merely a plot of land. Numerous sporting events, drama productions, and debates are conducted off the premises of the school, but are nevertheless school activities. When the Juneau Douglas High School physical education class runs on Glacier Avenue because there is no athletic field at the school, students are still in school and still under the authority of their teachers and administrators. To find any other way would fly in the face of common sense and popular understanding.

I believe it unreasonable to find that Joseph can stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school. His rights are those of a student at school. I therefore find that Joseph displayed offensive material that was contrary to the mission of the school.

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2.17 Truancy/Skipping

According to Joseph, his car had become stuck in a snow bank that morning. Removing it from the snow bank required outside assistance and caused him to be late to school. When he arrived at school, students were assembled on the sidewalk awaiting the passage of the Olympic Torch.

Joseph used poor judgment. He did not attempt to locate his class, nor did he go to the office to report his arrival at school.

Joseph is 18 years old and entitled to excuse his own lateness. He indicated in his remarks to me, which were not contradicted by his principal, that students are routinely admitted to class without an office pass.

It is my finding that after Joseph had overcome the inconvenience of his car being stuck in a snow bank and had arrived downtown, he was skipping class by failing to join his class or otherwise reporting to the office. The fact that he is 18 years old and can write and sign his own letter of explanation does not make his absence excused. However, had any other student come to the school, stayed outside for the activity, and then reported to his next class, it is unlikely that he would have been suspended from school. This will be addressed later.

2.05 Defiant/Disruptive Behavior

Joseph was directed to accompany the principal to her office after she confronted him about the banner he was displaying. Joseph stated that when directed to accompany the principal, he said that he was going to his car to get his books. When given a direction by the principal, it was defiant for Joseph to set his own conditions for compliance. The principal did not agree that Joseph might first go to his car. Joseph did not go to the principal's office; he went to his next class. He did not meet with the principal until

summoned out of class. Principal Morse stated that Joseph displayed a belligerent attitude throughout their meeting.

After Joseph was suspended from school he was instructed to leave the building via the front entrance to the high school. Instead, Joseph walked the entire length of the school to the Marie Drake complex, loudly refusing the directives of the principal. Other students were in the hall to witness Joseph's defiant behavior. While not a basis for the suspension that had previously taken place, Joseph's attitude and behavior after his suspension support the principal's allegation that Joseph displayed a generally defiant attitude in connection with this incident. I find that Joseph did exhibit defiant/disruptive behavior suficient to support discipline by the principal.

2.08 Refusal to Cooperate/Assist in Investigation

When the principal asked Joseph who else was holding the banner, Joseph replied, "he did not know them all." His reply may have been technically truthful, but it was not cooperative.

It appears the Principal and Joseph agree that the refusal of Joseph to tell who else was holding the banner is the basis for citing Joseph for refusal to cooperate/assist in an investigation. Joseph's letter of appeal asserts that "when a person is engaged in a lawful and legally-protected activity -- the exercise of a civil right -- he cannot be required to report the names of others also engaged in lawful activities."

I have found that Joseph's speech was not protected. Nevertheless, from the outset of the event Joseph made reference to First Amendment rights. While I have found that Joseph's speech was not protected, Joseph believed it was. I have not been presented with any information to indicate that other students were asked to identify those who participated in the banner incident. Joseph has admitted it

was his banner and he brought it to school. The principal should not place great weight on this violation of the discipline grid in determining the suspension period for Joseph.

2.07 Refusal to respond to a staff directive regarding behavior

The refusal to respond to a staff directive regarding behavior relates to Joseph's refusal to put the banner down when requested to do so by the principal. Joseph did not surrender the banner when asked to do so. It was only when other students dropped the banner and the principal was joined by Mr. Durand that Joseph surrendered the banner.

Joseph did refuse to respond to a staff directive regarding behavior.

Other

Joseph contends that all of his behavior is excusable because he was exercising his right to free speech. Even if I were to concede his speech across from the high school is protected (which I do not), the remainder of his behavior was not excused. I note that Joseph's behavior was radically different from the behavior of the students in Tinker. They were asked to remove their armbands or not return to school until the armbands were removed. They did not return to school until after the planned period for wearing the armbands had expired.

Joseph's disobeyed the principal's directive at the outset. Joseph refused to surrender the banner when requested. The principal requested him to come to the office to discuss his behavior. He did not. Joseph has a history of defiant behavior and has been suspended from school for defiance before.

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Conclusion

Joseph's behavior warranted his suspension from school. Students cannot be permitted to display speech that undermines the school's mission and disrupts school events, argue with their principal, and defy the lawful directives of teachers and school administrators. Suspension of Joseph for these reasons was justified. However, the suspension of Joseph for cutting class would likely not have taken place if Joseph had not been involved in the banner incident. In addition, I believe that Joseph's refusal to cooperate in an investigation should be treated with lenience.

Joseph was suspended from school for ten days. Midway through the suspension the remaining days were held in abeyance pending this appeal. I find that Joseph's suspension should be limited to the time he has already spent out of school and that the days of suspension previously held in abeyance should be removed from his discipline.

APPENDIX I — MINUTES OF THE JUNEAU BOARD OF EDUCATION MEETING OF MARCH 19, 2002

CITY AND BOROUGH OF JUNEAU
BOARD OF EDUCATION

Regular Meeting

Adopted

DATE AND PLACE	Tuesday, March 19, 2002 District Office Board Room
MEMBERS PRESENT	Mary Becker, President Chuck Cohen , Vice-president Carolyn Spalding, Clerk Deana Darnall Daniel Peterson Stan Ridgeway Alan Schorr
MEMBERS ABSENT	None.
STUDENT REPRESENTATIVE	Doug Jones (absent)
ADMINISTRATORS	Gary Bader, Superintendent Peggy Cowan, Assistant Superintendent Zachary Hanna, Business Services Manager Dave Newton, Principal, Auke Bay Elementary School
CALL TO ORDER	The meeting was called to order by Board President Mary Becker at 6:00 pm. in the

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	District Office Board Room. Ms. Becker led the flag salute.
EXECUTIVE SESSION	*Carolyn Spalding moved and asked unanimous consent to retire to executive session, to discuss a matter which may tend to prejudice the reputation or character of a person or persons. The matter to be discussed is student suspension* #02-01. (M-2804) - PASSED
RECONVENE	The Board reconvened in regular session at 6:10 p.m.
EXECUTIVE SESSION ACTION – STUDENT # 02-01	*Carolyn Spalding moved and Chuck Cohen seconded the motion that the Board of Education affirm the suspension of Student #02-01 for the reasons given in the Superintendent's decision.* (M-2805) - PASSED

APPENDIX J — PHOTOGRAPH OF FREDERICK'S "BONG HITS 4 JESUS" BANNER

[Photograph from Ninth Circuit record at SER 34.]

BEST AVAILABLE COPY